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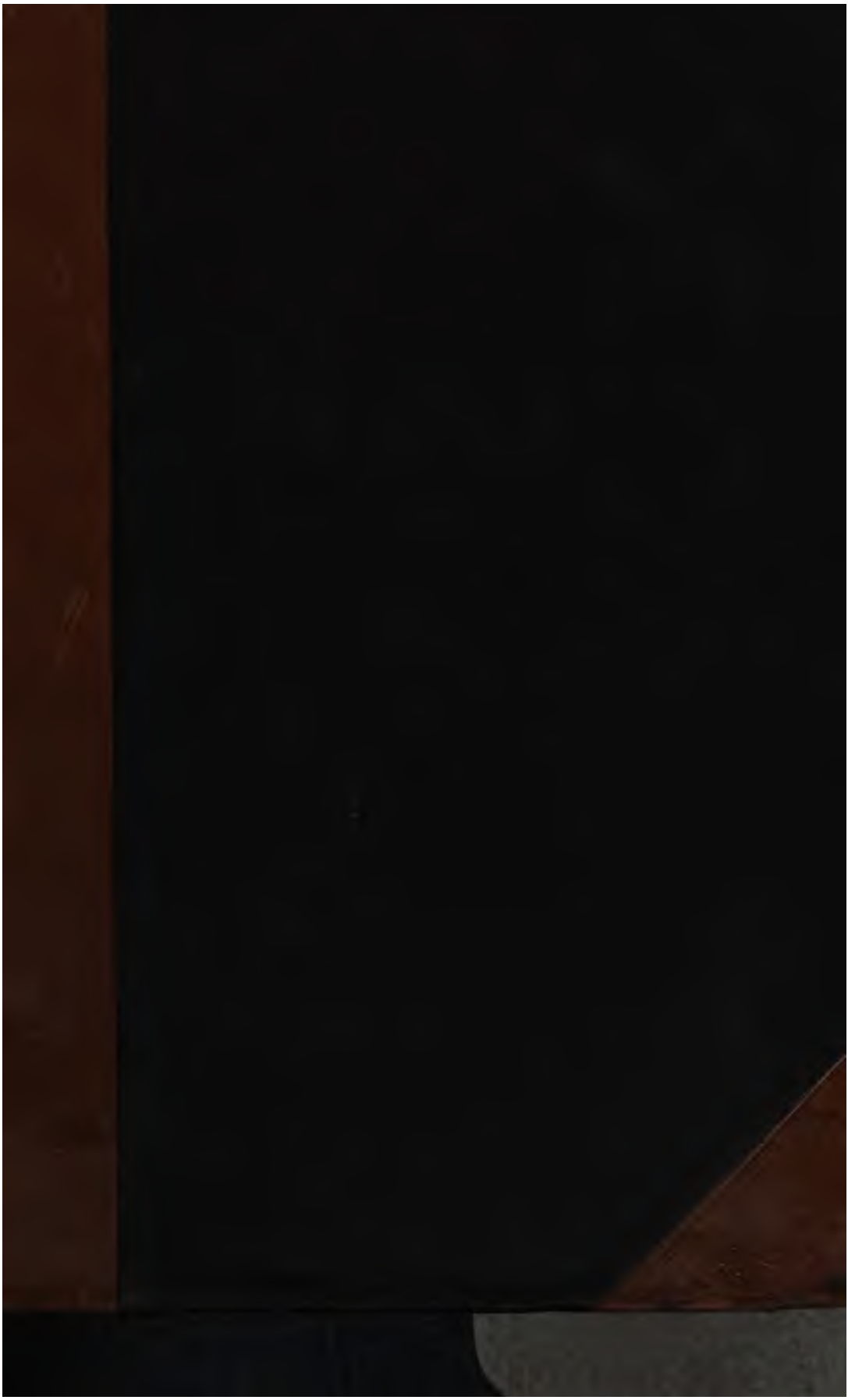

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THE

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LAW REPORTS

OF

CASES

DECIDED BY THE

HIGH COURT, CALCUTTA,

ALSO

JUDGMENTS OF H. M.'S PRIVY COUNCIL.

EDITED BY

G. S. HENDERSON,

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„ „	Charles Pontifex,	
„ „	William Ainslie,	
„ „	Ernest George Birch,	
„ „	George Gordon Morris,	
„ „	James Sewell White,	
„ „	Romesh Chunder Mitter,	
„ „	Henry Stewart Cunningham,	
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„ „	Arthur Wilson,	
„ „	Loftus Richard Tottenham,	
„ „	Lewis Price Delves Broughton.	*Officiating as a Judge.*

The Hon. Louis Steuart Jackson, C.I.E., was absent on leave from the 16th June 1879.

The Hon. Ernest George Birch retired from the Bench on the 18th April 1879.

The Hon. James Sewell White was absent on leave from the 15th July 1879.

The Hon. Henry Stewart Cunningham was absent on deputation from the 11th May 1878.

The Hon. Loftus Richard Tottenham officiated as a Judge from the 1st April 1879 to the 21st July 1879. Was appointed a Judge of the High Court and took his seat on the 21st July 1879.

The Hon. LEWIS PRICE DELVES BROUGHTON officiated as a Judge from the 11th May 1878.

The Hon. GREGORY CHARLES PAUL, C.I.E. ...	*Advocate-General.*
„ „ JOHN D. BELL ...	... *Officiating do.*
„ „ JOHN D. BELL ...	... *Standing Counsel.*
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Page	20,	3rd	line, from	top of head note	...	for	"1869" read "1868."
„	23,	4th	„ „	bottom ...	...	„	"236" read "326."
„	53,	2nd	„ „	„ ...	...	„	"improved" read "unproved."
„	54,	10th	„ „	„ ...	...		
„	57,	5th	„ „	„ ...	...	„	"aquatic" read "agnatic."
„	86,	7th	„ „	„ ...	...	„	"putro" read "poutro."
„	88,	6th	„ „	„ ...	...	„	"my" read "by."
„	102,	3rd	„ „	top of head note	...	„	"longer" read "shorter."
„	105,	4th	„ „	bottom ...	...		
„	124,	10th	„ „	top ...	...	„	"same" read "came."
„	127,	9th	„ „	„ ...	...	after	"17 W. R., 485," insert "and 18 W. R., 494."
„	194,	13th	„ „	„ ...	...	for	"cannot" read "can."
„	199,	11th	„ „	„ ...	...	after	"debts" insert "shall be unsatisfied."
„	257,	12th	„ „	bottom ...	...	for	"50" read "48."
„	319,	17th	„ „	„ ...	...	„	"ensure" read "enure."
„	513,	14th	„ „	top ...	...	„	"*maksoolsa*" read "*maksoola*."

CALCUTTA

HIGH COURT REPORTS,

ORIGINAL, APPELLATE, AND REVISIONAL.

[CIVIL APPELLATE JURISDICTION.]

BUSSUN LAL SUKUL (DEFENDANT) . . . . APPELLANT ;

AND

CHUNDI DAS AND OTHERS (PLAINTIFFS). . . RESPONDENTS.

1879
Feb. 5th.

No. 2 of 1878.

Res Judicata—Jurisdiction.

A sued B for arrears of rent. B admitted the amount claimed, but contended that it was payable for a larger area than that specified by the plaint. An issue was framed upon the question whether the amount was due upon the larger or smaller area, and decided against the latter. B afterwards brought a suit for a declaration that the money admitted to be due had been paid in respect of the larger area.

Held, that the suit was barred by the decree in the previous suit.

APPEAL under Letters Patent from a decision of Mr. Justice MITTER, differing from that of Mr. Justice MACLEAN, in special appeal from a decision passed by the first Subordinate Judge of Chittagong, affirming the decree of the Moonsiff of Potea.

This was a suit for declaration of plaintiffs' right to 3 drones 15 kunis 2½ gundahs as part of a share of a taluq held at Rs.105-9-16½ annual rent under the following circumstances :—The plaintiffs allege that a taluq containing 12 drones 10 kunis and 13 gundahs was created in favour of their father Bholanath and others in 1809 A.D., at a rent of Rs. 158-6-14¾, and that they are the owners of ¾rds of this taluq, or 8 drones 7 kunis 2 gundahs, and are liable for ¾rds of the rent, viz., Rs. 105-9-16½ for that quantity of land.

1879

BUSSUN LAL SUKUL v. CHUNDI DAS.

Statement.

In 1874 their landlord, Bussun Lal Sukul, the defendant, sued them for rent, alleging that they held 4 drones 7 kunis and 19 gundahs at the above rent of Rs. 105-9-16¼, and obtained a decree. The plaintiffs now contend that in that suit no issue was framed by the Court as to the area for which Rs. 105-9-16¼ was payable. The plaint recites the cause of action to be that the decision of 1874 has impeded their right to hold 3 drones 12 kunis 2½ gundahs, being the difference between 8 drones 7 kunis 2 gundahs and 4 drones 7 kunis 19½ gundahs as part of their share of the taluq, at a rent of Rs. 105-9-16¼, and that there is every probability of the defendant, Bussun Lal Sukul (plaintiff in the former suit) treating the above 3 drones 15 kunis 2½ gundahs as a separate taluq at a separate rent. Hence their prayer that the 3 drones 15 kunis 2½ gundahs might be declared part of their share of the taluq for which they pay Rs. 105-9-16¼.

The defendant Bussun Lal Sukul contended that the plaintiffs had no cause of action, and that the matter was already *res judicata*. The Court of First Instance held that the plaintiffs had a good cause of action and were not estopped, and that having established their right to the whole area of 8 drones 7 kunis 2 gundahs, made the declaratory decree asked for. This decision was confirmed by the lower Appellate Court, whereupon the defendant appealed to the High Court. The Judges of the Division Bench of that Court having differed in opinion upon the question of estoppel, an appeal under the Letters Patent was preferred.

Mr. *R. E. Twidale*, and Baboo *Aukhil Chunder Sen*, for Appellant.

Baboo *Sreenath Banerjee*, for the Respondent.

Mr. R. E. Twidale contended that in the former suit the issue —whether the amount claimed by the plaintiff in that suit was for the greater or larger area—had been distinctly raised, and was a material issue in the suit. The Moonsiff decided upon that issue that the then defendants had failed to prove that they held a greater taluq than 4 drones 7 kunis 2 gundahs. If the plaintiffs were dissatisfied with that decision they ought to have

appealed. They did not appeal, and they cannot now come in seeking to re-open the whole question determined in the former suit.

Sreenath Banerjee.—The defendants in the other suit admitted the plaintiffs'claim for Rs. 105, so that the issue as to the area was really immaterial. Whether it were decided one way or the other, it would not in the least have affected the plaintiffs' claim in that case. The appellant ought not to be allowed to take advantage of the decision in the other suit, in order at some future time to bring a fresh suit for enhancement. If he had sued for Rs.105, a decree would have been given upon the admission of the respondents. The object of the first suit was merely to recover so much money for arrears of rent, and it was not necessary to the decision of the main point in the case to decide for what amount of land it was payable. [JACKSON, *J.*—That was the only issue in the suit.] The issue was not a necessary issue, and the respondents therefore were not bound to appeal. From the case of *Krishna Behari Roy* vs. *Bunwari Lall Roy*, 25 W. R., P. C., 2, it appears that the issues must be not only material, but necessary.

The following judgments were delivered by the High Court (1):—

GARTH, *C.J.*:— GARTH, *C.J.*

The Judges of the Division Bench having differed in opinion, and the judgment of the senior Judge having prevailed, this case comes before us on appeal from his decision.

The suit was brought by the plaintiffs to obtain a decree, declaring that certain lands which they hold as tenants to the defendant at a rent of Rs. 105, comprised an area of 8 drones 7 kunis and 2 gundahs.

The Division Bench were agreed that upon the facts proved the plaintiffs were entitled to the relief for which they prayed. But the objection made by the defendant, upon which the learned Judges differed in opinion, was, that in a suit No. 308 of 1874, which was brought by the present defendant against the present plaintiffs for arrears of rent, an issue was distinctly raised between

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the parties, whether the land held by the plaintiffs at the rent of Rs. 105 was 4 drones 7 kunis and 19 gundahs, as the then plaintiff contended, or 8 drones 7 kunis and 2 gundahs, as the then defendants contended; and that upon this issue, evidence being given on either side the Court decided that the area of the land in question was 4 drones 7 kunis and 19 gundahs only.

Both the learned Judges of the Division Bench appear to have considered that the issue thus raised was immaterial for the purposes of that suit, because whichever way it was decided, the plaintiff would have been entitled to the rent which he claimed. But I confess I am unable to adopt that view. It seems to me that it was a very material question in that case, and certainly it was one to which the parties themselves attached great importance, whether the rent, which the then defendants admitted to be due, was payable in respect of the larger or the smaller area.

The then plaintiff advisedly claimed it in his plaint as payable for the smaller area only. The defendants as distinctly alleged that it was due in respect of the larger area. The issue raised upon these counter-statements was in fact the only question in the cause, and I cannot doubt that if the defendants had so pleased, they might have made the decision upon that issue the subject of appeal. But they did not choose to take that course. They accepted the adverse judgment of the Court, without appealing from it;—and now the question arises in the present case, whether that judgment is not conclusive. I am of opinion that it is.

This suit is confessedly brought for the express purpose of raising again the very same question that was raised and decided against the present plaintiffs in the former suit; and it would appear that the occasion which has given rise to this suit is that the present defendant is seeking to charge the plaintiffs with additional rent for the excess quantity of land which they hold over and above the 4 drones 7 kunis and 19 gundahs.

The plaintiffs, therefore, to relieve themselves of this threatened obligation, are asking the Court for a declaration, directly at variance with what was decided in the former suit. I consider that they cannot do this, and that the decision in the former suit is conclusive between the parties; and as my learned colleagues

agree with me, the result is, that the special appeal will be allowed, and the plaintiffs' suit dismissed with costs in all the Courts.

Judgment.

JACKSON, *J.* :—

JACKSON, *J.*

I am of the same opinion. Mr. Justice MITTER observes that the question relating to the area of this taluq was wholly foreign to the matter in dispute. Now the matter in dispute was that upon which the parties were at issue, and the only point on which the parties were in issue was, as to what was the area of the holding. The defendant then, the now plaintiff, might have avoided any finding upon that point, and might have desired the Court to abstain from coming to such a finding. He chose however to raise it, and it was material he should raise it ; as otherwise he might be bound in after proceedings by the finding that he was to pay Rs. 105 for 4 drones. Now this plaintiff evidently had a consciousness that he would be so bound, and therefore he did not wait for what he knew was to come after, that is to say, the claim of the landlord to enhance in respect of the remaining 4 drones, but he imagined he could forestall him by bringing a suit for a declaration. It was under the impression that findings of a Court in rent suits could be questioned in the Civil Courts that proceedings of this sort commonly originated, but that view has been dissipated by the decision of the Full Bench.

I think, therefore, that the present plaintiff is bound by the decision which he invoked, and with which he rested content by not disputing it by a regular appeal.

PONTIFEX, *J.* :—

PONTIFEX, *J.*

I concur.

[CIVIL APPELLATE JURISDICTION.]

1879 *Feb. 5th.*

No. 3 of 1878.

UNNODA CHURN DAS (PLAINTIFF) . . APPELLANT;

AND

MOTHURANATH DAS BISWAS AND OTHERS . . . . . } (DEFENDANTS) RESPONDENTS.

Act VIII (B.C.) of 1865, *section* 16—*Sale for Arrears of Rent—Cancelling of Under-tenures—Limitation—Act IX of* 1871, *Sch. II, Arts.* 119 *and* 120—"*Avoid.*"

The words of section 16 of Act VIII (B.C.) of 1865 do not enable the purchaser of a tenure at his option, or discretion, to avoid under-tenures—all under-tenures created by the former holder of the tenure being *ipso facto* avoided by the sale under that section. The purchaser and those claiming under him are, by Article 120 of Act IX of 1871, Schedule II, entitled to bring a suit for the purpose of realizing the subject-matter of those under-tenures within twelve years from the time of the sale.

The only interpretation to be put upon the word "avoid" in Articles 119 and 120 of Act IX of 1871, Schedule II, is to do something in exercise of the right of avoidance.

APPEAL under section 15 of the Letters Patent from a decision of Mr. Justice MARKBY, differing from that of Mr. Justice PRINSEP, in special appeal from a decision of the Officiating Judge of Backergunge, affirming the decree of the Subordinate Judge of that district.

The rents of a putni taluq having fallen in arrear, the zemindar brought a suit, obtained a decree, and in execution put the putni-tenure up to sale. At the auction sale, on the 28th December 1869, he purchased the tenure himself. At that time there were certain persons on the estate who held tenures under the putnidar. The zemindar neither collected rent from these persons, nor did he do anything to oust them until the 20th of April 1875, when he made a proclamation through the Court in which he had executed his decree, that he intended to take possession. He took no further steps until the 31st of May of the same year, when he granted a miras ijara of the zemindari to the plaintiff in this suit.

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The defendants held an usut taluq in the estate created by the putnidar. The plaintiff soon after the purchase gave them notice that he intended to cancel their tenure and take possession. The defendants refused to give up possession, and the plaintiff then brought this suit to eject them. The District Judge dismissed the suit, upon the ground that the right to cancel under-tenures upon the sale, of a putni for arrears of rent was a right which could only belong to the person who at the auction sale purchased the putni tenure or his assignee, whereas the plaintiff neither purchased at the sale, nor was he, the Judge thought, as miras ijaradar, the assignee of the purchaser. The Judges of the Division Bench on special appeal having differed, this further appeal under the Letters Patent was brought by the plaintiff.

Argument.

Baboo *Doorga Mohun Doss* for Appellant.

The question in this case is really one of the construction of Articles 118 and 120 of Act IX of 1871, Schedule II. In the Division Bench Mr. Justice MARKBY held that the purchaser must give notice of his intention to cancel the under-tenures within a reasonable time, and that these two Articles referred not to the cancelment of the tenure or encumbrance, but to the suit to get rid of a tenant or incumbrancer who persists in holding after the cancelment has taken place. Mr. Justice MARKBY is really laying down a period other than that laid down by the Law of Limitation.

To import the question of reasonable time was to interfere with and add to the law of limitation already in force. The under-tenures are avoided by the auction sale and not by any expression of intention to avoid them.

[PONTIFEX, *J.*:—The words of section 16 of Act VIII of 1865 are clear, and by that section the purchaser of an under-tenure sold under the Act acquires it "*free* from all encumbrances."]

Under the Statute the purchaser or his assigns may, at any time within twelve years, sue for possession. Mere laches or indirect acquiescence short of the period prescribed by law is no bar to the enforcement of a right absolutely vested in the plaintiff at the time of suit—*Peddamuthulaty* vs. *N. Timma Reddy*, 2 Mad. H. C. Rep., 270; *Juggernath Sahoo* vs. *Syud Shah Mahomed Hossein*, L. R., 2 I. A., 54. The same proposition is laid

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down in the case of *Taruck Chunder Bhuttacharjee* vs. *Hurro Sunker Sandyal*, 22 W. R., 267.

In this case the plaintiff claiming under the actual purchaser at the auction sale has a right to bring this suit for possession; *Koylash Chunder Dutt* vs. *Jubur Ali*, 22 W. R., 29; *Ranee Surnomoyee* vs. *Maharajah Suteesh Chunder Roy*, 10 Moore's I. A., 123; *Rajah Suttosurrun Ghosal* vs. *Mohesh Chunder Mitter*, 12 Moore's I. A., 271; and *Forbes* vs. *Meer Mahomed Hossein*, 12 B. L. R., P. C., 210.

Baboo *Sreenath Dass*, (for Respondents), contended that the plaintiff was not the assignee of the purchaser, and, therefore, was not entitled to bring this suit. The purchaser himself did not exercise his right of cancelling the under-tenures, and the plaintiff does not really render him.

Instead of transferring the tenure purchased to the plaintiff, the zemindar created an entirely new tenure—a miras ijarah.

[JACKSON, *J.*:—A miras ijaradar takes all the rights of the zemindar, and may bring any suit which the other might have brought for possession. The creation of the new tenure was an implied declaration that the under-tenures were cancelled.]

The following judgments were delivered by the High Court (1):—

GARTH, *C.J.*

GARTH, *C.J.*:—

This was a suit brought to recover khas possession of property under these circumstances:—

A putni taluq was sold by the zemindar for arrears of rent, and the zemindar himself became the purchaser. He then took possession of the property included in the putni, and afterwards granted a miras ijara of that, as well as of other property, to the present plaintiff. The defendants are the holders of an under-tenure created by the putnidar, and this suit is brought by the plaintiff claiming in right of the zemindar, the purchaser at the auction, to recover khas possession of the lands included in the under-tenure, upon the ground that it was avoided upon the sale of the putni.

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Judgment.

GARTH, *C.J.*

One of the points raised in special appeal before a Division Bench of this Court was, that the plaintiff had not brought his suit in proper time; and it was contended, that in order to avoid the under-tenure, the purchaser, or the plaintiff who claimed under him, should have done some act to cancel the under-tenure. The learned Judges were divided in opinion upon this point. Mr. Justice MARKBY considered, that in order to enable the plaintiff to bring this suit it was necessary that the zemindar, or the plaintiff claiming under him, should have declared the under-tenure cancelled within a reasonable time. Mr. Justice PRINSEP, on the other hand, thought that under Article 120 of Schedule II, of Act IX of 1871, the Legislature had prescribed the period of twelve years, as being a reasonable time within which the zemindar, or those claiming under him, might bring a suit of this nature. Mr. Justice MARKBY's view appears to have been founded on the supposition, that the sale of the putni did not of itself avoid the under-tenure, unless it was followed by an intimation by the purchaser, or those claiming under him, that he or they intended to exercise their right to cancel it; or in other words, that the under-tenures were only voidable at the option of the purchaser or his assigns; and that their option must be exercised within a reasonable time.

Now the language of Act VIII of 1865 (B.C.) is, that purchasers of tenures sold under that Act acquire them *free from all encumbrances, which may have accrued thereon by any act of any holders of those tenures, their representatives or assigns.* I think that must mean, that at the time when the purchaser acquires the tenure, all under-tenures created by the former holder of the tenure are *ipso facto* avoided by the sale; and that he and those claiming under him are, by article 120 of the Limitation Act, entitled to bring their suit for the purpose of realizing the subject matter of those under-tenures within twelve years from the time of the auction sale.

I confess, it seems to me, that the words of Article 120, "*to avoid encumbrances* of under-tenures in a putni talook, &c.," are hardly appropriate; because the sale itself in the view which I take avoids the under-tenures; and the suit to which Article 120 is intended to apply, must be, I think, a suit like the present, to

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recover possession of the subject of the under-tenure. As my learned brothers agree with me, the decision of the Division Bench, which was in accordance with Mr. Justice MARKBY'S opinion, will be reversed, and also the decisions of the lower Courts; and the plaintiff will be entitled to recover what he claims in this suit with costs in all the Courts.

JACKSON, *J.*

JACKSON, *J.* :—

I am of the same opinion. I think the only interpretation to be put on the word "avoid" in Articles 119 and 120 of Act IX of 1871, Schedule II, is, do something in exercise of the right of avoidance. The words of section 16 of Act VIII of 1865 (B.C.) are quite unambiguous and do not enable the purchaser, at his option or discretion, to avoid under-tenures, but declare that he acquires the tenure which is sold under the Act free from all encumbrances. But even if the case had been otherwise, I confess I see no ground for refusing the plaintiff his remedy in this case, because we understand that the zemindar, who was himself the purchaser of the putni talook, not only refused to receive rent from the holder of the ousut talook, but proceeded to create entirely other relations, by creating the lands comprised in the taluqs, or some of them, into a miras ijarah, that is to say, he parted with his rights and with the rights of the zemindar, absolutely, to a new holder, reserving only a certain ijarah rent for himself, and in that way, I should say, he gave, in the plainest manner, notice of his intention to avoid, it may be called, or to act upon the privilege which the law confers of acquiring this tenure free of all encumbrances created by the previous putnidar. I can see that to import the condition that the intention of the purchaser must be declared within a reasonable time would be placing a limitation upon the plain words of the Legislature which is quite beyond the power of the Court.

PONTIFEX, *J.*

PONTIFEX, *J.* :—

I agree that the decisions of the lower Courts must be reversed.

[CIVIL APPELLATE JURISDICTION.]

E. SOLANO . . . . . (JUDGMENT-DEBTOR) APPELLANT;
AND
WILLIAM MORAN & CO. (DECREE-HOLDERS) RESPONDENTS.

1879
Feb. 19th.

No. 258 of 1878.

Execution of decree—Decree, Right to recover under, limited to specific property—Procedure.

In a suit upon a bond under which certain lands were mortgaged, the decree ordered "that the amount claimed together with costs be caused to be paid by the defendants to the plaintiffs in this way,—that the property pledged under the bond be held bound by the decree, and that the decree be realized by the sale of the pledged property," no provision being made for realization from the other estate of the judgment-debtor in the event of the proceeds of the pledged property failing to satisfy the decree. *Held*, that under the circumstances it must be presumed that the Court meant to limit the right of the plaintiff to recover to the mortgaged property and to that alone, and that the judgment-creditor could not, in execution of his decree, proceed against the other estate of the judgment-debtor.

APPEAL from an order passed by the Subordinate Judge of Shahabad.

The question to be decided in this case is whether a decree, made by the Subordinate Judge of Shahabad, on the 16th June 1876, gives to the judgment-creditor a right to recover the amount of the decree from the whole estate of the debtor, or limits his right of recovering the same amount from certain properties mortgaged under a bond upon which the suit was brought and decreed. The words of the decree are as follows:—"It is ordered and decreed that the case of the plaintiff be decreed; that the amount claimed, together with costs, be caused to be paid by the defendants to the plaintiff in this way,—that the property pledged under the bond be held to be bound by the decree and that the decree be realized by the sale of the pledged property." The order then goes on to release the defendants, who are the executors of the debtor, from personal responsibility, and also to discharge their own personal property in respect of this debt, but

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there is no further provision for the realization from the other estate of the deceased in the event of the proceeds of the pledged property failing to satisfy the decree.

In execution of this decree, the respondents, without having first sold the pledged property, attempted to attach in the hands of the Collector certain money, the proceeds of a sale of other properties of the judgment-debtors, which had not been mortgaged under the bond.

On the 5th August 1878 the Judge ordered that the pledged properties should first be sold, and that the money in the hands of the Collector should not be withdrawn, but should remain there until after the sale, to satisfy the decree in the event of the proceeds of such sale not being sufficient for that purpose. Against this order the judgment-debtor appealed.

H. Bell and Baboo *Chunder Madhub Ghose*, Baboo *Gopee Nath Mookerjee*, and Baboo *Omer Nath Bose*, for the Appellants.

Mr. *R. E. Twidale* and Mr. *Adkin*, for the Respondents.

H. Bell:—The terms of the decree expressly limit the execution to the mortgaged property. This must have been the intention of the parties or the decree would not have been drawn out in this unusual form. The decree must be executed as it stands, and cannot be altered in the Execution Department—*Ulfutunnissa* vs. *Mohan Lal Sakul*, 6 B. L. R., Ap., 33.

The money which has been attached was the proceeds of a property not covered by the mortgage, and was, therefore, not attachable under the express terms of the decree. Secondly, there is no allegation that the mortgaged property is not sufficient to satisfy the decree; and until, therefore, execution has been taken out against the mortgaged property, no other property can be touched. *Jogendra Nath Mullick* vs. *Rajah Bijoy Keshub Roy*, 19 W. R., 161; *Kali Dass Ghose* vs. *Lal Mohan Ghose*, 16 W. R., 306.

Mr. Twidale:—By the true construction of the decree execution is not limited to the mortgaged property. In *Fukeer Buksh* vs. *Chatterdharee Chowdhry*, 14 W. R., 209, it was held that a mortgagee decree-holder in a case of this suit was not restricted to the mortgaged property alone. He has full power to proceed against

other property. If it were not so, the judgment-debtor might sell all his other property and so defeat the decree.

The judgment of the Court (1) was delivered by AINSLIE, *J.*, who, after stating the facts, proceeded as follows :—

Whether or not it was the intention of the Court making the decree to limit its order in a particular way, we cannot now consider. We can only look to the actual words of the decree; and in order to give to this decree the construction which the decree-holder seeks to put on it, it seems to us that it would be necessary to exclude the words "باین طور" (in this manner). Had these words been excluded, it might very well be that the decree-holder might, under the general words "the case be decreed, the plaintiff do recover the amount claimed from the defendant, and the property pledged be sold in execution of the decree," go on from the property pledged to any other property. But when the Subordinate Judge has stated that the amount decreed is to be recovered in a specific way, we must presume that he intended it to be recovered in that way and nos other.

As far as my personal experience goes, I believe that decreer on mortgage bonds are usually drawn up with a provision fot realization from the general property of the debtor in the even of the pledged property proving insufficient, and in fact from the judgments in the cases which have been referred to by Mr. Twidale for the respondent, namely, one in 14 W. R., at p. 209 and another unreported case, Miscellaneous Regular Appeal No. 404 of 1876, we find that such must have been the form of the decree in both cases. This induces me the more to believe that by inserting these particular words which I have referred to above, the Subordinate Judge meant to limit the remedy which he granted in a particular way. The parties in this case are not persons who are likely to be ill advised; and if this was not the intention of the Subordinate Judge, it is hard to understand how this peculiar phrase in the decree came to be used without comment.

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We think, therefore, that in execution of the decree as made we ought to declare that the decree-holder can only proceed against the pledged property. Consequently the injunction issued by the Court below must be withdrawn, and the appeal allowed with costs.

[CIVIL APPELLATE JURISDICTION.]

Feb. 19*th.*

Nos. 946 to 985 of 1878.

RAM LALL SINGH AND OTHERS . . . . PETITIONERS;

AND

JANKI MAHATOON . . . . . OPPOSITE PARTY.

Charter Act, section 15—*Application for Review—Jurisdiction.*

Forty-six suits were brought against the defendants, and dismissed by the Moonsiff of B. The plaintiffs in each case appealed to the District Judge, who reversed the decision of the Moonsiff. In both Courts all 46 cases were disposed of in one judgment. Six of the cases being appealable, special appeals in such cases were preferred to the High Court, and pending such appeals, an application for a review of the remaining 40 cases was made to the District Judge, who ordered that the petition for review should stand over until the result of the special appeals should be known. The High Court having on special appeal restored the decision of the Moonsiff dismissing the suits, the application for review was renewed before the successor of the former District Judge. He refused to admit the application.

Held, that the District Judge had not declined jurisdiction or acted beyond his jurisdiction, and that the High Court had therefore no power under section 15 of the Charter Act to interfere.

RULE obtained under section 15 of the Charter Act.

In this case the facts were these:—Against the present petitioners forty-six suits were brought by the ryots in the Court of Moonsiff of Behar, and dismissed on the 29th July 1876. The plaintiffs appealed to the District Judge, Mr. Grey, who reversed the decision of the moonsiff. All forty-six cases were disposed of in both Courts by one judgment. Of these cases six only were appealable to the High Court, and in these special appeals were preferred. In the meantime application was made for a review in the remaining forty cases, and on

the 5th of April 1877, Mr. Grey made an order that the hearing of the petition for review should stand over until the special appeals were decided.

The High Court having found in favour of the special appellants, the application for review in the other cases was renewed before Mr. Brown, who had meanwhile succeeded Mr. Grey as District Judge. Mr. Brown refused to grant a review. Thereupon a rule to show cause why the order refusing the review should not be set aside was obtained in the High Court under section 15 of the Charter Act, on the ground that the District Judge had declined jurisdiction in the matter.

Branson and Baboo *Mohesh Chunder Chowdhry*, Mr. *C. Gregory* and Mr. *M. L. Sandel*, for the Petitioners.

Moonshee *Mahomed Yusoof*, for Opposite Party.

Branson contended that the District Judge, Mr. Brown, had been misled entirely by that class of cases which laid it down that if A sues B and the case is dismissed upon a certain view of the law, and if after the time for appeal and review has passed, a Superior Court in another suit lays down the law differently, so that upon that construction in the case supposed A should have succeeded, that is no ground, for granting, after the time has passed, a review of the case.

He contended also that Mr. Grey's order was in fact a conditional order, and that there could be no doubt the real meaning of his order was this :—'I have decided all the cases upon a particular construction of the law ; that construction I have no reason to doubt, but six of the cases are under appeal to the High Court, and if their Lordships there should think my view of the law is wrong, then I shall alter my view, admit the other cases to review, and decide according to their interpretation of the law.'

This being so, Mr. Brown is varying and going behind the order of his predecessor, Mr. Grey, which was beyond his jurisdiction to do; or, he has refused to grant the review upon a wrong construction of the law. He thinks, because it has been held that a subsequent statement of the law is no ground for admitting a review after the time for reviewing a judgment has passed, therefore he cannot admit this review. That is an erroneous

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view of the law, and being under this misapprehension, he has declined to exercise his jurisdiction and admit the review. In either hypothesis he is wrong, and the Court can, under section 15 of the Charter Act, set him right.

Judgment.

The following judgment of the High Court (1) was delivered by

BROUGHTON, *J.*

BROUGHTON, *J.*:—

In these cases there were forty-six suits for damages, instituted by ryots in the Court of the Moonsiff of Behar, against the defendant, on the allegation that the defendant had not allowed a certain *bund* to be cut, and that, in consequence their lands had been flooded and their crops destroyed. Those suits were decided by one judgment, and on one set of evidence, and the Moonsiff dismissed them on the 29th of July 1876. The plaintiffs in all forty-six suits appealed to the District Judge, who, on the 22nd December 1876 decided all forty-six appeals by one judgment, and decreed the suits in favor of the ryots. Six of those cases being above five hundred rupees in value were appealable, and all the rest were not appealable. Those five cases were appealed to the High Court.

In the meantime the defendants in the other cases applied to the Judge to review his decision, and the Judge on that application stated that he thought there were no sufficient grounds for admitting the review; but he says, it is represented that in five analogous cases (it ought to be six and not five) a special appeal had been preferred to the High Court, and that if the petition be now rejected, the judgment passed by this Court may, although found to be erroneous by the High Court, be unassailable in respect of the forty-one cases in which no special appeal is allowed. He then says: "On the whole I think that it is only fair to allow this petition to stand over for orders until the result of the special appeals be known. Argument will then be heard whether this petition is admissible." So that in fact he made no order, but left the matter to stand over till the special appeals were decided.

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BROUGHTON, *J.*

If the case had come before him, as it did before his successor, Mr. Brown, there is no doubt that he might, if he pleased, have rejected the application for review; and there would have been no ground for setting aside his order.

It appears to us that the order of Mr. Brown of the 12th of July 1878,—when the High Court had decided the suit in favor of the defendant and when the defendant again applied for a review of the earlier judgment,—was an order supplementing the order made by Mr. Grey on the 5th of April 1877. He heard the argument and decided, as he had jurisdiction to decide, that the review could not be admitted. In deciding an application under section 15 of the Charter Act, we have nothing to do with the question whether that decision is right in point of law, or not. He had jurisdiction to make it, and he did make it.

Mr. Branson then puts forward another ground besides the grounds on which he had obtained these rules. He says, that the judgment on which the decree against his client in the forty-one cases stands having been reversed, the decrees must necessarily fall.

That question is, however, not before us, and even if it were, it appears that although the judgment was one judgment in forty-six cases, it was one judgment only for the convenience of the parties; and that, although it might not have been copied forty-six times, it was substantially forty-six judgments though in the same terms.

We think that the Judge has acted within his jurisdiction. It is only when a Judge declines jurisdiction or acts beyond his jurisdiction that the parties aggrieved can move this Court under section 15 of the Charter Act.

The rule must be discharged with costs.

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Feby. 19*th.*

[CIVIL APPELLATE JURISDICTION.]

No. 1176 of 1878

IN THE MATTER OF APUCH OJHA . (DEFENDANT) PETITIONER;

AND

MUSSAMUT RAM DULARI KOER . . . . . } (PLAINTIFF) OPPOSITE PARTY.

Appeal from order—Act X of 1877—*General Clauses Act I of* 1868, *section* 6.

A decree was obtained *ex-parte* before October 1st, 1877, and an application was made by the defendant for the first time in May 1878, to have the case re-opened. This application was refused, and an appeal was thereupon preferred against the order of refusal. *Held*, that no appeal would lie under Act X of 1877, and that, as there was, at the time of that Act coming into operation, no proceeding on foot on the part of the appellant which could be saved by the operation of section 6, of Act I of 1868, there was no remedy by way of appeal from the order under Act VIII of 1859.

Runjit Singh vs. *Meharban Koer*, 2 C. L R., 391, distinguished.

THIS was a rule calling upon the plaintiff to show cause why an appeal should not be heard by the District Judge.

Moonshee *Mahomed Yusoof* showed cause.

Baboo *Jodoonath Sahai contra.*

The facts are sufficiently set forth in the following judgment of the High Court (1) :—

This is a rule calling on the plaintiff to show cause why an appeal should not be heard by the District Judge.

On the 13th of April 1877 a decree was made in favor of the plaintiff *ex-parte*. No proceedings were taken to execute this decree until after the new Code of Civil Procedure came into operation, *i. e.*, until after the 1st of October 1877. The execution was taken out in the month of April 1878, and on the 14th of May 1878 the defendant applied to have the case re-opened. This application was rejected on the 11th of June. An appeal

(1) AINSLIE and BROUGHTON, *J.J.*

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was made against this order on the 2nd of August 1878, and it was rejected.

The question is, whether the case is governed by the old Procedure Code, Act VIII of 1859, or by the new Procedure Code, Act X of 1877. The two Codes differ in this respect, viz., that the old Code provided that if an application to set aside a judgment *ex-parte* were rejected, an appeal lay from the order of rejection, but the decree itself was final. The new Code (X of 1877) makes no distinction between decrees which are passed *ex-parte* and other decrees; all are appealable, but when an application is made under section 108 to set aside an *ex-parte* decree, passed against a defendant under section 100 and rejected, no appeal lies against the order of rejection. This provision in section 108 applies only to applications to set aside *ex-parte* decrees, passed under section 100 of the same Code; so that it does not apply to the present case, in which the *ex-parte* decree was passed before the new Code came into force. If the application to set aside the *ex-parte* decree had been made before the new Code came into operation, the applicant would have, on the authority of the Full Bench in *Runjit Singh* vs. *Meharban Koer*, 2 C L. R., 391, commenced a proceeding which would have been kept on foot by section 6, Act I of 1868, and would have been governed as to its procedure by the old Code, and he could, under that Act, have appealed from the order rejecting his application. But he did not apply until after the new Code came into operation: there was therefore no proceeding of his on foot which could be saved by the operation of section 6, Act I of 1868. Consequently, the applicant has no remedy by way of appeal from the order.

His remedy is by way of appeal from the original decree, under the new Code, section 540, which is general, and not limited to decrees passed since that Code came into operation. It may be that he is out of time for such an appeal, but it may be that he ought to be allowed the period during which he has been taking these proceedings.

[CIVIL APPELLATE JURISDICTION.]

1879 *Jan.* 1*st.*

No. 360 of 1878.

TARA CHAND BISWAS AND OTHERS . . . . . } (DEFENDANTS,) APPELLANTS

AND

RAMGOBIND CHOWDHRY AND OTHERS . . . . . } (PLAINTIFFS,) RESPONDENTS

Consideration, Failure of—Refund of Purchase Money—Covenant quiet enjoyment.

The plaintiffs who had been durputnidars of two villages belongi a certain taluq which was sold for arrears of rent under Act VIII (I of 1869, and purchased by the defendants, took from the purch a fresh durputni lease of their former two villages, and of a third vil and for such lease paid Rs. 1,199. Subsequently, the sale of the being set aside, the second lease was avoided, and the plaintiffs were restored to their former position as durputnidars of the villages, brought a suit for a return of the consideration money o lease so avoided.

Held, that the plaintiffs were entitled to recover.

Semble, that putnis, durputnis, and se-putnis, although they may be in strict analogy with leases in England, contain, in themselves, cient of the nature of such leases for the Court to allow to the grant cases where it is otherwise equitable, that protection which a less England is understood to grant his grantee for possession of the la

APPEAL from an Appellate Decree of the Judge of Nud affirming a decision of the Subordinate Judge of Nuddea.

In this case the plaintiffs were durputnidars of two vill The putni tenure was sold for arrears of rent under Regul VIII of 1819, and the plaintiffs' durputni was thereby exting ed. The purchasers of the taluq were the defendants, and plaintiffs immediately after the sale took from them a fresh of their durputni, adding to it a third village, and for this they paid the defendants Rs. 1,199. The pottah contain stipulation for the refund of the bonus money in case the te should lapse through the default of the defendants.

About four years afterwards the putni sale was set aside, ar the parties concerned were restored to the positions they forc

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occupied, the plaintiffs recovering their old durputni of the two villages and losing that of the third village by reason of the lease in which it was included having ceased to be of any force. Thereupon the plaintiffs instituted the present suit to recover from the defendants the consideration money which they had paid to them for the second lease. The Courts below gave the plaintiffs a decree for the amount claimed by them. Against that decree the defendants now preferred a special appeal.

Phillips, and Baboo *Lall Mohun Doss*, for the Appellants.

Baboo *Hem Chunder Banerjee*, for the Respondents.

The following judgment was delivered by the Court (1) :—

The point for decision in this case is no doubt one of some importance, and if we entertained any serious doubt upon it, we should certainly have reserved it for further consideration. But it really seems to us not to admit of any question.

The learned counsel for the appellants rested his contention upon several points; firstly, that the rule of English law as to guarantee for quiet enjoyment which is involved in a demise of property has not been applied to cases in this country; secondly, that a durputni is not a lease, but is rather an out-and-out sale; thirdly, that if there were any general principles which otherwise enabled a purchaser to look for indemnity, he had deprived himself of that protection by making a particular stipulation; and, lastly, that in fact the purchaser has had his consideration for that for which he paid the value, and, therefore, he has no right to be indemnified.

Now, it seems to us that putnis, durputnis, and seputnis, although they may not be in strict analogy with leases in England, lie somewhere between out-and-out sales and leases, and that at all events they contain in themselves sufficient of the nature of a lease to incline us to give the grantee or taker, in cases where it is otherwise equitable, that protection which a lessor in England is understood to grant his grantee for possession of the land. In the first section or preamble of Regulation VIII of 1819, putnis and the subordinate durputnis and seputnis are through-

(1) JACKSON and MCDONELL, *J.J.*

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ment.

out spoken of as tenures and under-tenures, and the instruments granting them are called leases. The fact that a consideration is commonly paid does not seem to us to make the transaction as one of pure sale, because it arises from this generally, that the grantors are persons in need of money. Their needs vary with circumstances, and according as their need for money is greater or smaller, the consideration is in proportion larger or smaller, and the rent reserved is accordingly smaller or greater. It seems to have been thought not only by Mr. Justice KEMP, but also by Sir BARNES PEACOCK, that the rules applicable to the relation of landlord and tenant in England would be applicable in this country where no precise rule regulating the subject is to be drawn from the Hindu or other common law, and certainly where those principles appear to be equitable we should be inclined to apply them.

Then it is said that the plaintiffs in this case have put themselves out of Court by stipulating for the refund of their purchase-money in a particular contingency. Now, putting aside the fact that deeds in this country are not prepared with the assistance of attorneys or counsel, and that we ought not to draw the same entire inferences from stipulations or omissions here as we should draw in England, it seems plain enough that the parties in this case sought to provide for the consequence of any act of bad faith as between the grantor and the grantee. It may be that they overlooked the fact that the law already provided sufficient protection, but at any rate, they thought it advisable to insert this stipulation, and it was accordingly inserted. What has occurred in this case, however, is an accident of a different kind. No bad faith is imputed to either party, but the vis-major of the Court has been called into exercise, and the transaction has proved altogether void.

On its being pointed out that the Regulation in such cases expressly protected the purchaser of the tenure which had been sold, and of which the sale had been afterwards set aside, the learned counsel suggested that the express provision for protection in his case would seem to exclude the protection going further. But it seems to us that that is not quite the effect of the section. The section does not so much declare that the purchaser, whose

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sale is afterwards set aside, shall be indemnified, as provide for the precise, immediate, and simple manner in which that is to be done, by directing that he shall be made a party to the suit for setting aside the sale, and the decree by which the sale is set aside shall contain a provision for his being indemnified.

Then, in the absence of any precise rule, this Court is called upon to apply the principles of equity and good conscience. We find that the transaction between the plaintiffs and the defendants in this case is the direct result and outcome of a previous transaction in which the defendants had paid money, and in which they had been indemnified on the transaction being set aside. We have no doubt that in like manner, as they have been indemnified for the loss, they ought to be compelled to refund to their grantees, the plaintiffs, the amount paid by them. For these reasons we think the Judge is right, and that this appeal must be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

Feb. 19*th.*

No. 236 of 1878.

HURBUNS SAHAI AND OTHERS, AUCTION PURCHASERS . . . . . } APPELLANTS;

AND

BHAIRO PERSHAD AND OTHERS, JUDGMENT-DEBTORS . . . . . } RESPONDENTS.

Appeal—Act VIII of 1859, *section* 257—*Execution proceedings under Act X of* 1877—*Irregularity in Execution Sale—Act X of* 1877, *sections* 284 *and* 290—*Proclamation Waiver of.*

Execution proceedings brought after Act X of 1877 came into operation, upon a decree obtained in a suit instituted under the old Code of Civil Procedure, are subject to the provisions of the new Code, and an appeal will lie from orders made in such proceedings, although no appeal was allowed from such orders under the old Code.

A sale in execution of a decree after several adjournments by consent of the parties was, pending an application to the Collector to take over the management of the property under section 236 of Act X of 1877, fixed for the 6th of May 1878, and a proclamation of such sale was made on the 5th of April. The Collector not having taken over the management, on the 6th of May, the Court itself fixed the 3rd of June

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for the sale, and a fresh proclamation was made on the 10th of May. On the day of the actual sale the judgment-debtor made an application under section 284, that only an 8-pie share of the property should be sold, on the ground that that would realize by sale enough to satisfy the outstanding balance on the decree.

Held, that as the adjournment until the 3rd of June, though it might have been for the benefit of the judgment-debtor, was not at his request, the law requiring thirty days to elapse between the proclamation and the sale must be strictly complied with; and, further, that the application made on the day of sale did not amount to such a consent in writing as under section 290 would operate as a waiver of the proclamation.

APPEAL from an order passed by the Sub-Judge of Shahabad.

Baboo *Mohesh Chunder Chowdhry*, Baboo *Chunder Madhub Ghose* and Baboo *Jadoo Nath Sahai*, for Appellants.

Mr. *M. L. Sandel*, for Respondents.

The facts are sufficiently set forth in the judgment of the High Court (1), which was as follows :—

The appeal was filed on the 31st of August 1878 and is from an order dated the 13th of July 1878, setting aside a sale of land in execution of a decree, which decree was made in November 1875. The sale was set aside on the ground of irregularity causing substantial injury. The first application for execution of the decree was made on the 13th of November 1877 after the new Civil Procedure Code came into operation.

It is objected that no appeal lies on the ground that the case is governed by Act VIII of 1859, and that section 257 of that Act (the old Procedure Code) enacts that an order setting aside the sale shall be final. It is contended on the other hand that the order is appealable under section 588 (*m*) of the new Code which gives an appeal. It appears to us that the appeal lies. The opinions recorded by the Chief Justice and Mr. Justice JACKSON in the Full Bench case in 2 C. L. R., 391—*Runjit Sing* vs. *Meharban Koer*, support this view, and we see no reason to differ from those learned Judges.

As regards the merits of the case, the law requires a sale of and in execution to be preceded by a notice published at least

(1) AINSLIE and BROUGHTON, *J.J.*

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thirty days before the sale. The sale in this instance took place upon the 3rd of June 1878. The proclamation was made upon the 10th of the preceding month of May. It is contended, however, that there was a written consent to the sale given by the judgment-debtor, such a consent as by virtue of section 290 of the new Code does away with the necessity for a proclamation to be made thirty days before the sale. It is further contended that the day on which the sale took place (3rd of June) was really fixed by adjournment, the sale having been originally fixed for the 3rd of May. The written consent, upon which the appellants rely, is an application made by the judgment-debtor upon the day of the actual sale. This application was for the sale of an 8-pie share of the property, on the ground that such a fractional part would realize by sale enough to satisfy the outstanding balance due on the decree. Section 284 of the new Code authorizes the Court to sell such portion of the property attached as may be sufficient to satisfy the decree. It appears to us that this application did not amount to such a consent in writing as under section 290 would operate as a waiver of the proclamation. We think that it merely amounted to a request made by the judgment-debtor that, if his property must be sold, at any rate it was unnecessary to sell the whole of it: And it is to be further noted that there was a second application to sell a further share of 8 pies, which, according to the result of the first sale, would have probably sufficed to satisfy the decree, and that this must be taken to be what the judgment-debtor consented to, if his consent is to be relied on.

With regard to the second objection, namely, that the 3rd of June was merely an adjourned day. It appears that the decree was passed on the 29th of November 1875, and the first application for execution was made on the 12th of November 1877. On the 16th of November 1877 the sale was fixed for the 4th of February 1878, and proclamation was made on the 27th of November 1877, in the Court-house. On the day fixed for the sale, the judgment-debtor applied for a postponement, which was at first refused, but later on the same day the judgment-debtor made another application, and, with the consent of the judgment-creditor, the sale was postponed for a week, on the condition that

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the judgment-debtor would pay the debt within that period; if he did not do so the sale was to take place on the 12th of February. On the 11th of February another application was made for postponement. It was granted, and the sale was postponed until the 23rd of February. There was another adjournment until the 1st of April, and a fresh proclamation was made on the 28th of February in the Court-house. Three days before the 1st of April the judgment-debtor applied to have the money raised, not by sale, but by his property being taken under the management of the Collector under section 326 of the Code. Thereupon the sale was postponed until the 6th of May, and the Court published a new proclamation on the 5th of April in the Court-house. The Court at the same time referred to the Collector, asking him to act under section 326, but as the Collector did not reply, the Court itself fixed the 3rd of June for the sale.

The cases cited do not support the contention that this should be treated as an adjourned sale requiring no fresh notification. The first case in 18 W. R., page 347, *Roy Gowree Nath Sahoy* vs. *Shah Fukeer Chand* was a mere adjournment *de die in diem*, which constantly must happen when the list of properties for sale is more than can be sold in one day. In the other cases fresh notice had been expressly waived. In the present instance the adjournment of the 6th May was not at the request of the debtor, though it may have been in his interest and there was no waiver, and, therefore, a strict compliance with the law was requisite.

Lastly, on the question of substantial injury, we think that the debtor made out a sufficient case for the cancelment of the sale. He made an application which the Court could have complied with under section 284. The fact that an 8-pie share had been sold for Rs. 5,000 was good evidence that the application was reasonable, and, therefore, the Court was bound to exercise its discretion. "Discretion, when applied to a Court of law, means discretion guided by law. It must be governed by rule, and not by humour. It must not be arbitrary, vague, and fanciful, but legal and regular." (Lord Mansfield in Wilkes' case, 4 Burrough's Rep., 2539). The result of the refusal to exercise its discretion has been, as far as we can judge, to sacrifice the property of the debtor, one-half of which might have been saved altogether,

whereas it was all sold at an inadequate price. The sale of the entire 2-annas share was irregular from want of due notice, and was moreover one which the Court, in the exercise of a sound discretion, ought not to have held at all. 1879

We would, therefore, dismiss the appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

CHANDHARI SITAL PERSHAD SINGH AND ANOTHER, (JUDGMENT-DEBTORS) APPELLANTS;

AND

JHUMAH SINGH . . . . (DECREE-HOLDER) RESPONDENT.

Feb. 19th.

No. 226 of 1878.

Appeal—Act X of 1877, *section* 284—*Execution of decree, Question relating to—Act X of* 1877, *section* 588 (*i*).

A judgment-debtor having applied, under section 284 of Act X of 1877, that certain property attached in execution of a decree against him should be sold in successive 8-pie shares, on the ground that the amount due under the decree was only Rs. 9,000, and that on a former occasion a similar share of the same property had sold for Rs. 5,000, the Judge refused the application. *Held* that, the question between the parties was one relating to the execution of a decree; and accordingly that, although no appeal was given by the Act against an order under section 284, there was an appeal under section 588 (j).

APPEAL from an order passed by the First Subordinate Judge of Shahabad.

In this case an application was made by the judgment-debtors under section 284 of Act X of 1877, for an order that certain property, against which it was sought to execute a decree for Rs. 9,000, should be sold in a particular way. The petition alleged that the value of the property in question was Rs. 60,000, and on the ground that upon a former occasion an 8-pie share of the same had sold for Rs. 5,000, prayed that the decree should be executed by a sale, first, of an 8-pie share, and if that should not have been sufficient, then by another 8-pie share, and so on until the whole decree should be satisfied. The Judge refused the application, and thereupon the judgment-debtors preferred this appeal.

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CHANDHARI SITAL PERSHAD SINGH v. JHUMAH SINGH.

Judgment.

AINSLIE, *J.*

Mr. *M. L. Sandel*, for the Appellants.

Baboo *Nil Madhub Bose*, for the Respondents.

The following judgment of the High Court (1) was delivered by

AINSLIE, *J.* :—

It is suggested by the learned pleader for the respondent that no appeal lies in this case, inasmuch as it is an appeal against an order under section 284 which is not provided for in the Code. But it appears to us that section 284 is merely a section empowering the Court to comply with an application for sale in a particular way. The question which has to be decided is clearly a question between the parties to the suit in respect of the execution of the decree, and, therefore, an appeal lies under clause (j) of section 588.

As to the merits of the case itself, we have only to refer to our judgment in appeal in the case of *Harbuns Sahai* vs. *Bhairo Pershad*, (2).

We think that, under the circumstances, the Subordinate Judge ought to grant the prayer of the judgment-debtor to sell his property in successive portions of 8-pie each, until the decree is satisfied.

We, therefore, allow the appeal with costs.

(1) AINSLIE and BROUGHTON, *J.J.*

(2) Reported *ante*, 23.

[CIVIL APPELLATE JURISDICTION.]

SHEO GOLAM LALL (DECREE-HOLDER) . . APPELLANT; 1879. 24th Feby.

AND

BANI PROSAD (JUDGMENT-DEBTOR) . . . RESPONDENT. No. 267 of 1878.

Execution of Decree—Decree, Agreement altering terms of—Jurisdiction.

On the day fixed for the sale of certain property in execution of a decree the judgment-debtor agreed with his creditor that in consideration of his allowing proceedings to be stayed, he would, within six months, pay the amount then found due upon the decree, with interest at 24 per cent., a higher rate than was allowed by the decree. Upon the terms of this agreement proceedings were stayed. Default having been made, and the judgment-creditor having applied for fresh execution of the decree with interest at the higher rate, the judgment-debtor objected that it was not competent for the Court to issue execution for the higher rate of interest stipulated for by the parties, but that the Court was bound to-adhere strictly to the terms of the decree.

Held, that the judgment-debtor was estopped by his conduct from raising such objection. *Sadasiva Pillai* vs. *Ramalinga Pillai*, L. R., 2 Ind. App. 219, cited.

APPEAL from an order passed by the Judge of Gya affirming the order of the Subordinate Judge of that district.

Mr. *M. L. Sandel*, for the Appellant.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Omarendro Nath Chatterjee* for the Respondent.

The facts sufficiently appear from the following judgment of the High Court (1), which was delivered by

AINSLIE, *J.* :— AINSLIE, *J.*

The decree in this case was made on the 13th January 1873, against the respondent. It was put into execution in that year, and there were further applications made from time to time, the result for which had been that the judgment-debtor had obtained the consent of the decree-holder to periodical postponements for periods of six months or so, on the condition of paying him interest at the rate originally of 18 per cent., and subsequently of 24 per cent. In each of these, I think, certainly in the later

(1) AINSLIE and BROUGHTON, *JJ.*

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petitions it has been the practice to state the amount due under the decree at the date of the petition, and it has been specially agreed that, that amount as principal, with interest thereon should be paid. At last, some time in February 1877, an application was lodged by the decree-holder, whether as a fresh application for execution of decree, or for continuing proceedings is immaterial. On the 15th of May 1877, being the date fixed for the sale of the debtor's property, the debtor put in a petition with the consent of the creditor, by which the sum of Rs. 1,692-6-9 was taken to be the amount of the decree up to date, and it was agreed that in consideration of the creditor allowing the sale to be postponed for six months, the debtor should pay him that sum of Rs. 1,692-6-9 within six months, together with interest thereon at the rate of 24 per cent. per annum.

The order on that application made by the Court was wrong in form. The proper order would have been to suspend further proceedings, and to put the case on the board for hearing on some early date after the expiry of six months allowed by the decree-holder. Instead of that, the case was taken off the file, but with this provision that the attachment should remain. The attachment, therefore, was actually in force on the date on which the Civil Procedure Code of 1877 came into force. This application was made on the 24th of January 1878, for proceeding with the execution of the decree. It has been drawn up, no doubt, in the tabular form prescribed by section 212 of Act VIII of 1859; but there is no prayer in it for attachment, and it is evident that it is an application to proceed upon what the decree-holder understood to be a subsisting attachment. In fact, we must take it that, although the Court had irregularly struck the case off the file of pending cases, there was legally an application to execute the decree pending at the time that the Procedure Code of 1859 was repealed, and that this application of the 24th of January 1878 was made within a reasonable time, and must be treated as a prayer to the Court, to go on with the proceedings which had been instituted under the old Code.

The case, therefore, comes within the recent Full Bench decision, and the objection taken by the respondent as to the admissibility of the appeal, must be overruled.

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SHEO GOLAM LALL v. BANI PROSAD.

Judgment.

AINSLIE, *J.*

As to the main question, whether the decree-holder is, or is not entitled to proceed upon the terms of the agreement of the 15th May 1877, we think that it is only necessary to refer to the case of *Sadasiva Pillai* vs. *Ramalinga Pillai*, in L. R., 2 Indian Appeals, 219. In that case their Lordships in the Privy Council taking notice of the general concensus of the Courts in India as to the construction to be put upon section 11 of Act XXIII of 1861, accepted the ruling of the Indian Courts, although they stated that had the matter been *res integra* they probably would not have taken such a limited view of the matter. But although they accepted the ruling that where the decree is silent touching interest or mesne profits subsequent to the institution of the suit, the Court executing the decree cannot assess or give execution for such interest or mesne profits, they did in that suit allow execution to be taken out for mesne profits which were not specifically included in the decree, but in respect of which the defendant had entered into an agreement to account for on the condition of execution of the decree being stayed. Their Lordships were of opinion that this probably was a question relating to the execution of the decree within the meaning of the latter part of section 11, but even if it did not come under that, they thought that under the ordinary principles of estoppel the respondent could not then say that the mesne profits in question were not payable under the decree.

Where parties by mutual agreement make certain terms and inform the Court of them, and the Court sanctions the agreement and makes an order in conformity with it, either party who has had the benefit of the arrangement and order is not at liberty to resile from the agreement.

The question whether such an agreement does or does not violate the rule that a Court cannot add to its decree, becomes, under the circumstances, one which the Court will not enter into, the party who seeks to raise such question being estopped by his own conduct and the action of the Court taken thereunder.

The judgment of the lower Court must be reversed, and the decree-holder declared entitled to execute his decree in the terms of the agreement of the 15th of May 1877.

[CIVIL APPELLATE JURISDICTION.]

1879 Feby. 27th. HURRO NARAIN CHOWDHRY. (PLAINTIFF) APPELLANT;

AND

No. 1287 of 1878. SADHA KRISTO BURA AND OTHERS . . . . . (DEFENDANTS) RESPONDENTS.

Practice—Party to suit—Distraint.

A landlord who supplies seed to his tenants upon condition that they shall cut and store the crops grown therefrom in his *chuck*, and after threshing the same, shall make over to him one-half of the produce, has such an interest in, and dominion over the crops, as to entitle him to bring a suit against a person who has wrongfully distrained such crops.

APPEAL from Appellate Decree, passed by the Judge of Midnapore, affirming the decree of the Subordinate Judge of that District.

Baboo *Troilokyo Nath Mitter*, for Appellant.

Mr. *R. E. Twidale*, and Baboo *Mohiny Mohun Roy*, for the Respondents.

The facts are sufficiently set forth in the judgment of the High Court (1), which was as follows :—

This suit is brought by a talookdar to contest the demand of a distrainer, and to try the plaintiff's right to the possession of the crops distrained. The defendant admits that he distrained the crops, but denies the plaintiff's right to, and possession of the land. The plaintiff's case was, that he had some of the lands in dispute at a money rental and some in *bhag* jote. The finding of the Court of First Instance was, that all the lands were let at a money rental, and that the plaintiff was therefore not entitled to the crops distrained. The opinion of the Subordinate Judge was, that the plaintiff could not bring such a suit, because he had no right to the crop which the Subordinate Judge considered to belong to the cultivators. The suit was accordingly dismissed, and the defendant was declared, according to the provisions of section 96, Act VIII of 1869, entitled to recover the sum which had been deposited by the plaintiff as security when removing the crop.

(1) BIRCH and MITTER, *J.J.*

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In appeal, the Judge differed from the first Court as to the conditions of the tenancy, and held that the plaintiff, under the terms of his contract with his tenants, had no right of possession in the standing crops, but only a lien upon the crop when cut and stored in the thrashing floor; that even if the plaintiff had any right to the crop, the tenants should have been joined as co-plaintiffs; and that this not having been done, the suit would not lie. The Judge also expressed an opinion that suits under section 96 were always instituted by the tenants who raised the crop. Finding that possession was with the tenants, and that they should have instituted the suit, the Judge, with the same modification as to the amount recoverable by the defendant, dismissed the appeal, and confirmed the order of the Court of First Instance.

In this case a number of hookumnamahs have been put in by the plaintiff which set forth the arrangement come to between him and his tenants; and these documents have been accepted by the Judge as genuine. But he puts upon these documents a construction which we think erroneous. The interpretation we put upon that arrangement is this: The landlord under exceptional circumstances supplied the seed; and the agreement was, that the tenants should cut and store the crop on his *chuck*, after the thrashing division was to be made between the landlord and the cultivators. The dominion over the crop was with the landlord, and if that crop was cut by some one else under cover of the law of distraint, the landlord was clearly the person entitled to sue to contest the demand of the distrainer.

Upon the facts the Judge's finding is against the distrainer, and he discredits the evidence adduced by him as to the cultivation of the crop. We think that the distrainer has failed to show that he was entitled to make the distraint; and that the plaintiff has such an interest in the crops distrained as entitles him to institute this suit to set aside the distraint. The result is, that the decision of the lower Court must be reversed, and the plaintiff's suit must be decreed by setting aside the illegal distraint of the defendant. The plaintiff will recover costs of all the three Courts from the defendant.

[CIVIL REFERENCE.]

1879 Feb. 24th.

No. 2 of 1879.

BISHESHWAR DEY PODDAR ... (DEFENDANT) APPELLANT;

AND

BUNGSHIDHUR MOOKERJEE ... (PLAINTIFF) RESPONDENT.

Limitation—Surety on bond undertaking to pay Eventually—"Shesh projunto"—Act XV of 1877, Sch. II. Art. 65.

A, verbally became surety upon a bond executed by B for repayment, in May 1872 to the plaintiff of certain advances, promising "if B does not pay eventually ('*shesh projunto*') I will." Default was made, and in April 1878 the plaintiff filed a suit against both A and B, the suit being clearly barred as against the latter. *Held*, that the words "*shesh projunto*" could not be taken as limited to the time specified in the bond, and that the lower Court, in order to determine whether the suit was barred against A, must find upon the evidence when a demand was made upon him for payment and then apply Art. 65 of Act XV of 1877, Sch. II.

REFERENCE under section 617 of Act X of 1877, from the Officiating Judicial Commissioner of Chota Nagpore.

The terms of the reference are as follows :—

There are two defendants in this case, only one of whom, the second, appeals. The plaintiff is the Government pleader at Purulia. The first defendant executed a registered bond to the plaintiff, binding himself to make good, in Bysack 1279, corresponding with May 1872, certain advances, etc., which he had received for the making of ornaments. The plaint was filed in April 1878. The first defendant does not defend the case; the second defendant is, his uncle, and appears to be a man of substance, and plaintiff's case is, that he became security verbally for the debt, in this way: "if the defendant does not eventually (*shesh projunto*) pay it, I will." The debt has not been paid, and the plaintiff now sues both defendants, and has got a decree by which the first defendant is made primarily liable and the second defendant on his default.

1879.

BISHUMBER DEY PODDAR v. HUNGSHE-SHUR MOOKERJEE.

Statement.

The first question is, was there consideration for appellant's promise? This is a matter depending on the oral evidence, and that evidence, which I see no reason to disbelieve, proves, I think, consideration. It appears that plaintiff would not have accepted the bond from the first defendant, but had threatened to bring a criminal charge against him for which there seems to have been some grounds, unless appellant stood surety, and on the latter verbally consenting to do so, the bond was accepted and registered three days after execution, and plaintiff took no further steps until the institution of this suit. The above, as I have said, depends on oral evidence. Neither plaintiff nor appellant has been examined, but the evidence of the witnesses, who have deposed as above, stands unrebutted.

The next question is, whether the second defendant (appellant) gave the guarantee at all or not? Here again we have only the oral evidence to fall back upon, and I see no reason to discredit it. It was not necessary that the guarantee should be in writing though it is certainly somewhat remarkable that plaintiff did not insist on its being put into writing. Appellant set up an *alibi* which he has attempted to prove by certain documents which I have had read, but which do not, in my opinion, prove or even make the fact improbable, that appellant was not at the time at the place where plaintiff alleges the guarantee to have been given.

The last question for consideration—and the only one on which I entertain any doubt—is the point of limitation. Plaintiff's pleader has urged that section 128 of the Contract Act shows that his client has the same period of limitation against both defendants. But I am doubtful whether this contention is sound. The nature of the illustration given to the section seems to point in a different direction. If this section cannot bear the construction contended for, Art. 65 of Sch. II, Act XV of 1877, seems to be in point, and in that view the suit would be barred, as I think plaintiff's cause of action must be held to have occurred on the day the bond was due and unpaid by the first defendant, that is to say, very nearly six years before suit. The suit is, in my opinion, barred by limitation; but as I am by no means certain that my opinion is correct, and as the case is

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BISHUMBER DEY PODDAR v. HUNGSHESHUR MOOKERJEE.

Judgment.

one of considerable importance, I beg to refer it to the High Court for decision of the question whether the suit is barred by limitation or not?

Baboo *Gooroo Dass Banerjee*, for the Appellant.

Mr. *H. E. Mendies*, for the Respondent.

The following judgment upon the reference was delivered by the Court (1):—

The second defendant agreed to make good the amount advanced to first defendant if the latter did not eventually pay it. The words "*shesh projunto*" cannot, in our opinion, be limited to the time specified in the bond. The promise on the part of second defendant was to secure the plaintiff from loss. And it will be for the Judge to determine upon the evidence when the demand was made upon second defendant, and then to apply the provisions of Art. 65, Act XV of 1877, Sch. II.

[REVISIONAL JURISDICTION.]

IN THE MATTER OF GOLAP COOMARY DOSSEE. PETITIONER;

Feby. 26th.

AND

RAJAH SOONDUR NARAIN DEO AND ANOTHER

Act VIII of 1859, *section* 138—*Records sent for—Discretion of Court as to sending—Act X of* 1877, *section* 137.

A Court has no discretion to refuse to send records which have been sent for, by another Civil Court under section 138 of Act VIII of 1859.

IN this case the facts are these:—

The petitioner having instituted a suit in the Court of the Deputy Commissioner of Maunbhoom, in order to prove her title, requested that officer to send, under section 138 of Act VIII of 1859, for the records of a case from the Court of the Judicial Commissioner of Chota Nagpore. The records were accordingly sent for, but the Judicial Commissioner refused to give them up,

(1) BIRCH and MITTER, *J.J.*

1879

In re GOLAP COOMARY DOSSEE v. RAJAH SOONDUR NARAIN DEO.

Judgment.

justifying his refusal by section 137 of Act X of 1877, and Circular Order No. 15, dated 16th December 1875.

Thereupon the petitioner applied to the High Court that the Judicial Commissioner should be directed to forward the record sent for.

Baboo *Bhobany Churn Dutt* appeared for the Petitioner.

The following order was made by the Court (1):—

In this case, we think that the Judicial Commissioner was not justified in refusing to send the record which had been sent for by a Civil Court, under section 138 of Act VIII of 1859. The Judicial Commissioner had no discretion in the matter. The record had been sent for by a Civil Court for good and sufficient reasons, and it was not open to the Judicial Commissioner to question the propriety of the order of that Court.

The Circular Order to which the Judicial Commissioner refers, does not justify his order. It directs that records are to be sent when required for the purposes of section 138, and only points out that Courts are not to abuse the provisions of that section.

The Judicial Commissioner must be directed to send the record at once to the Court which sent for it.

(1) BIRCH and MITTER, *J.J.*

[CIVIL APPELLATE JURISDICTION.]

1879
Jan. 29th.

No. 196 of 1878.

KRISHNO KUMAR BAISAK AND ANOTHER ... ... (DEFENDANTS) APPELLANTS;

AND

BHIM LALL BAISAK AND ANOTHER ... ... (PLAINTIFFS) RESPONDENTS.

Jurisdiction—Partition—Suit for partition of lands excluded by Collector in former partition.

On partition of a certain mehal, lands belonging thereto were excluded by the Collector. It being afterwards satisfactorily found that such lands really belonged to the mehal, and ought not to have been so excluded, it was *held* that a suit would lie in a Civil Court for partition of the excluded lands on the basis of the former partition.

Sree Misser vs. *Crowdy*, 15 W. R., 243, distinguished.

SPECIAL APPEAL from a decree of the Judge of Dacca, reversing a decision of the Moonsiff of Kaliganj.

In this case the facts are these:—The plaintiffs and the defendants who appear in this suit were formerly joint tenants of a certain mehal called Begumabad which, on partition by the Collector, was divided into three estates, the former becoming proprietors of two, and the latter of the third of these estates. At the time the partition was made, an objection was raised by the other defendants (who have not appeared) that a portion of the lands included by the partitioning Amin in the estate of Begumabad really belonged to their adjoining estate of Algi, and the ultimate result of this objection was, that the Collector excluded that portion of the estate in making partition. It afterwards appeared that the lands so excluded had got into the possession of the answering defendants, and the plaintiffs thereupon brought a suit, claiming to be entitled to recover their shares therein on the basis of the partition. It was satisfactorily proved that the lands had really formed part of the Begumabad Mehal. The Moonsiff, however, dismissed the suit, being of opinion that the lands had been excluded from the

portion under a mistake of fact, and turning out to be a portion of that part of the estate allotted to the defendants, had become the property of such defendants by a process analogous to accretion, and that the plaintiffs had, therefore, no right to claim a share therein. This decision was on appeal reversed by the District Judge. Whereupon a second appeal was preferred to this Court by the defendants.

1879

KRISHNO KUMAR BAISAK v. BHIM LALL BAISAK.

Judgment.

Baboo *Kali M. Doss*, and Baboo *Nullit Chunder Sen*, for the Appellants.

Baboo *Doorga Mohun Doss*, for the Respondents.

The following judgment of the High Court (1) was delivered by

JACKSON, *J.* :— JACKSON, *J.*

It is contended on this special appeal that the suit will not lie, or, in other words, that a partition of the estate to which this land is claimed as belonging, having taken place under orders of the Collector, the Civil Court was not competent to entertain the further question whether the land in dispute belonged to the estate which was divided, the Collector having been of opinion that it did not so belong.

Now it seems to us clear upon the authority of the case cited before us *Sree Misser* vs. *Crowdy*, 15 W. R., 243 that, if the Collector had taken this land in hand and divided it, the Court would be devoid of jurisdiction; but the Collector having been of opinion that the land did not belong to the estate, the question was one which the Civil Court had jurisdiction to determine, viz., whether it did or not so belong. We think the judgment of the Court below is right, it being understood, however, that the decree is only to entitle the plaintiff to possession of 10 annas share, at present undivided, of the land in dispute.

The parties might possibly apply to the Collector to re-open the partition so as to divide the land which was not the subject of partition in the previous instance as well as the remainder.

The respondent will be entitled to his costs.

(1) JACKSON and MCDONELL, *J.J.*

[CIVIL APPELLATE JURISDICTION.]

1879
Jan. 30th.

No. 304 of 1878.

OGRA KANT CHOWDHREE AND OTHERS . . . . . } (PLAINTIFFS) APPELLANTS;

AND

MOHESH CHUNDER SICKDAR AND OTHERS . . . . } (DEFENDANTS) RESPONDENTS.

Onus of Proof.

In a suit for possession of land the defendants claimed to hold under a valid miras tenure so as to be entitled to the ground rent from the ryots, and to pay the plaintiff who was the superior landlord merely the miras rent. *Held*, that the plaintiff being admitted to be landlord, the *onus* was upon the defendants to prove either that they had a valid miras tenure, or that they had held adversely to the plaintiffs as mirasdars for more than 12 years, and that the plaintiffs had notice of such adverse holding.

Rajah Sahib Prahlad Sen vs. *Budhu Sing*, 2 B. L. R., P. C., 111, cited and followed.

APPEAL from an Appellate Decision of the Officiating Judge of Furridpore, affirming the decision of the Moonsiff of Mudunpur.

Baboo *Doorga Mohun Dass*, and Baboo *Grish Chunder Chowdhree*, for the Appellants.

Baboo *Shoshee Bhoosun Dutt*, for the Respondents.

The facts are sufficiently set forth in the judgment of the High Court (1), which was delivered by

JACKSON, *J.* JACKSON, *J.*:—

We think the Judge has missed the principle on which this suit ought to be determined. As between landlord and tenant, a tenant claiming to hold by payment of rent is not entitled to bar the landlord by limitation, but in this case what the defendant claimed was to hold the land under a valid miras

(1) JACKSON and MCDONELL, *J.J.*

tenure so as to be entitled to the ground rent from the ryots, and to pay the plaintiff, who was the superior landlord, merely the miras rent.

Now, the plaintiffs being admitted landlords made a *primâ facie* case, and it lay upon the defendants to show either that they had a valid *miras* tenure, or by reason of their having held as mirasdars adversely to the plaintiffs for more than 12 years, the plaintiffs were debarred from questioning their right. That the plaintiffs cannot be barred unless they have had notice of such holding for 12 years has been decided in the case of *Rajah Sahib Prahlad Sen* vs. *Budhu Sing*, 2 B. L. R., P. C., 111. The case, therefore, must go back to the District Judge, in order that he may determine whether the plaintiffs' suit ought to be thrown out on this ground. This is not a case in which mere ryots' evidence as to possession will be of any avail. It must be shown that the landlord had notice of the adverse claim. The case must be remanded accordingly, and the costs of the appeal will follow the result.

[TESTAMENTARY AND INTESTATE JURISDICTION.]

1879
Feby. 24th.

IN THE GOODS OF J. F. HEWSON, DECEASED.

Administrator-General, Grant of Letters of Administration to—Act II of 1874—Act XIII of 1875, section 2—Assets in another Presidency.

Grants of letters of administration to an Administrator-General are entirely governed by Act II of 1874, and are in no way affected by Act XIII of 1875; and now as formerly such grants of letters, though general in form, are still limited to the Presidency of the Administrator-General to whom they are granted.

IN this case an application was made on behalf of the Administrator-General of Bengal for letters of administration to the estate and effects in the Presidency of Bengal as defined by section 3 of Act II of 1874, of Lieutenant J. F. Hewson, who died leaving property not only in Bengal, but also in the Presidency of Bombay.

When the petition was presented in Chambers, Mr. Justice PONTIFEX was of opinion that the property in Bombay should have been included in the list of assets set out in the petition; and, that in order to save the expenses of two administrations, letters of administration having effect throughout British India should be granted, the learned Judge being further of opinion that under Act XIII of 1875 such administration could be granted. The matter was again brought before the same learned Judge in Court, and his Lordship then granted an *interim* order until the next sittings of the Appeal Court, for administration limited to the Presidency of Bengal, but, having a doubt as to whether, since the passing of Act XIII of 1875, it was necessary to limit grants of administration to a particular Presidency, desired that the point should be referred to two or more Judges for final order. The question was accordingly referred to a Bench consisting of GARTH, *C.J.*, and WHITE, *J.*

Evans appeared for the Administrator-General.

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In re HEWSON.

Judgment.

GARTH, *C.J.*

The following judgments were delivered by the Court (1) :—

GARTH, *C.J.* :—

In this case, at the instance of the Administrator-General, an order was applied for before Mr. Justice PONTIFEX for a limited grant of administration to the effects of Lieutenant J. F. Hewson, deceased. The learned Judge having doubts as to whether, since the passing of Act XIII of 1875, a grant of administration to the Administrator-General does not, unless otherwise directed by the grant, extend to any property of the deceased throughout the whole of British India, and if so, whether he ought, in the present case, to limit the grant as desired by the Administrator-General, to the Presidency of Bengal, has made an *interim* order so limiting the grant, but referring the case to this Court, that we might make a definite order in the matter, which would have the effect of settling the practice in the future.

Mr. Evans has accordingly argued the case before us on behalf of the Administrator-General, and has directed our attention to the several enactments which bear upon the question, as well as to the practice which has prevailed in the other Presidencies since the passing of Act XIII of 1875.

After considering his argument I have arrived at the conclusion that grants of administration to an Administrator-General must still be limited to his own Presidency, and that those grants are not affected at all by the Act of 1875.

It seems to me to have been the intention of the Legislature that grants of administration to the Administrator-General should be regulated entirely by the Act of 1874.

By the 66th section of that Act it is provided that nothing "contained in the Succession Act, 1865, shall be taken to affect "the rights, duties and privileges of the Administrator-General "of Bengal, Madras and Bombay."

Then it is very important to observe that Act XIII of 1875 does not contain any substantive provisions, but is entirely confined in its operation to amending certain sections of the Succession Act of 1865.

(1) GARTH, *C.J.*, and WHITE, *J.*

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In re HEWSON.

Judgment.

GARTH, *C.J.*

The recital is, that "whereas under the Succession Act of 1865, the effect of an unlimited grant of probate or administration is confined to the province in which such grant is made, and that it is expedient to extend over British India the effect of such grants" (that is, grants made under the Succession Act) "when made by a High Court," &c.

"Section 2 then enacts, that to section 242 of the Indian Succession Act of 1865, the following proviso shall be added:"—

"Provided that probates and letters of administration granted by a High Court after the first day of April 1875, shall, unless otherwise directed by the grant, have like effect throughout the whole of British India."

The enactment, therefore, simply makes an addition to the Succession Act of 1865, and applied only, as it seems to me, to grants of administration made under that Act, and as section 66 of the Administrator-General's Act of 1874 provides that the Succession Act of 1865 shall not affect the rights or duties of Administrators-General, I consider that those rights and duties cannot be affected by any addition which is subsequently made to the Succession Act.

If a general grant of administration to the Administrator-General of Bengal had the effect of vesting in him any property belonging to the estate of the deceased situate in Madras, the rights and duties of the Administrator-General of Madras, as regards that property, would undoubtedly be affected by the grant.

It might operate certainly as an advantage to the public, that each estate should be dealt with separately by one Administrator-General, but it might also lead to much jealousy and inconvenience as between different Administrators-General, and I cannot help thinking that the intention of the Legislature, in making the Act of 1875 a part of the Succession Act, was to leave the position of Administrators-General precisely as it was before.

We have desired inquiries to be made of the Registrars of the High Courts at Madras and Bombay, and we find that no alterations have been made by those Courts in grants to the Administrator-General since the Act, and that those grants have always been considered as limited to the particular province in which they are granted.

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In re HEWSON.

Judgment.

WHITE, *J.*

In this view of the case, it will not, I think, be necessary to limit the grant as desired by the Administrator-General, but it will be issued in the same form as it always has been, the effect of it being controlled in accordance with our present judgment.

WHITE, *J.*:—

The petition presented by the Administrator-General of Bengal in the goods of Lieutenant Hewson, deceased, shows that the intestate died, possessed of certain assets within the territorial area assigned by Act II of 1874, to the Administrator-General of Bengal, and also of assets to the extent of about Rs. 1,000 within Scinde, which is comprised in the territory assigned by the same Act to the Administrator-General of Bombay.

The Administrator-General, in applying for letters of administration, contended that he was entitled to a grant limited to the assets within his own territory.

The learned Judge, to whom the application was made, has submitted to us the question,—whether, having regard to the provisions of Act XIII of 1875, he ought so to limit the grant.

Act XIII of 1875, which is an Act to amend the law relating to probates and letters of administration, directs, by section 2, that letters of administration, granted by a High Court after the 1st day of April 1875, shall, *unless otherwise directed by the grant*, have effect throughout the whole of British India.

The first question that arises is,—whether the above section applies in the case of grants to the Administrator-General.

I am of opinion that it does not. Previous to the passing of Act XIII of 1875, letters of administration, granted by the High Court of Calcutta, could only have effect throughout the provinces as defined by the Indian Succession Act, 1865, that is to say, throughout that division of India over which the High Court has jurisdiction.

This effect was given to the grant by virtue of section 242, coupled with section 264 of the Indian Succession Act. The preamble of Act XIII of 1875 refers to this fact in the following words:—"Whereas under the Indian Succession Act, 1865, the effect of an unlimited grant of letters, made by any Court in British India, is confined to the province in which such grant is made."

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In re HEWSON

Judgment.

WHITE, J.

The Act then proceeds, by section 2, to amplify the effect of such a grant in the case of the High Court, and it does this by enacting that a proviso shall be added to section 242 of the Indian Succession Act. It appears to me that the intention of the Legislature was to extend the effect of a High Court grant only in cases where the grant was made under the Indian Succession Act.

The 66th section of the Administrator-General's Act (II of 1874) directs that nothing contained in the Indian Succession Act of 1865 shall affect the rights, duties and privileges of the Administrator-General. This clause is not re-enacted in Act XIII 1875, but I think that section 66 applies not only to the Succession Act, 1865, but also to the proviso added to section 242 of that Act by Act XIII of 1875.

Independently of this construction, I should hold that section 2 of Act XIII of 1875 does not apply to grants issuing to the Administrator-General.

These are not made nor could be made under the Indian Succession Act, nor by any power to grant administration which the High Court may have inherited from the Supreme Court. The Administrator-General has no *locus standi* to apply for letters except under the special Act of 1874. His right takes its root from that Act alone. Again, the High Court has, under that Act, jurisdiction to grant letters to the Administrator-General in many cases in which it could have no jurisdiction, were the applicant an ordinary person. The Act of 1874 has assigned to the Administrator-General of Bengal a much more extensive territory than that which is subject to the High Court or than the province, as defined by the Indian Succession Act.

The late Supreme Court could only grant administration where assets were found within its jurisdiction as defined by charter. The High Court, except under the Administrator-General's Act, can now only grant administration when the deceased has left property within its province (section 246, coupled with 264 of Act X of 1865). But under Act II of 1874 it can grant letters to the Administrator-General of Bengal, although there are no assets within its province, provided there are assets within the territory assigned to the Administrator-General, as for instance,

in the Punjab or the North-West Provinces (section 14 of Act II of 1874.)

It thus appears that prior to the passing of Act XIII of 1875, the High Court did, on the case of the Administrator-General, grant letters *which were not confined to the province in which the grant was made.* This circumstance, added to the exceptional position in which the Administrator-General is placed by Act II of 1874, furnishes to my mind a strong reason for holding irrespective of the construction which extends section 66 of Act II of 1874 to section 2 of Act XIII of 1875, that the Legislature never intended Act XIII of 1875, to apply to grants made to the Administrator-General.

The conclusion I have arrived at on this question is fortified by the opinion of Mr. Justice Green of Bombay, which, though extra-judicial, is entitled to considerable weight. That learned Judge, as appears by the papers submitted by the Counsel of the Administrator-General, stated in answer to a reference made to him by the Registrar of his Court and the Administrator-General of Bombay, that "notwithstanding the precedent of the practice adopted by the High Court at Madras he should recommend that the practice followed under Act II of 1874 should not be altered by any reference to the provisions of Act XIII of 1875."

Although of opinion that section 2 of Act XIII of 1875 does not apply to grants to the Administrator-General, I think that such grants should not, except under special circumstance (of which none exist in the present case), be limited to the assets within the territory assigned to the Administrator-General of Bengal, or be limited in any other respect.

The grant being the creature of Act II of 1874, its form and effect must be governed by that Act until altered by the Legislature. No form of grant is given by the Act, but by section 29, where letters are granted to the Administrator-General by virtue of his office, he is authorized to act *as administrator of the estate to which the letters relate.*" Beyond this statement, the Act is silent as to the area over which the grant, when once made, is to operate. It certainly does not prescribe that where the assets of the deceased person lie within two or more of the territories

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In re HEWSON.

Judgment.

WHITE, J

assigned to the respective Administrators-General, the form or effect of the grant shall be different to what it is where the assets lie wholly within the territory of one Administrator-General. Nor does it expressly give to each Administrator-General, as against his brother Administrators-General monopoly of the administration of the assets which happen to lie within his territory. Whether it impliedly does so or not, is a question that need not be determined now.

I am of opinion, therefore, having regard to the provisions of Act II of 1874, that the *form* of the grant, in the case before us, should be general and unlimited; and this is agreeable to the existing practice, as stated by Mr. Evans, the Counsel for the Administrator-General, and confirmed by the precedents which he handed to us, and in which the ordinary form of grant was general and unlimited in its terms. It is a distinct question what the effect of the grant will be,—meaning by that, what is the area in India over which the grant will operate. Beyond saying that its effect, whatever it may be, is not enlarged by section 2 of Act XIII of 1875, it is unnecessary to decide that question upon the present application. The precise effect and operation of a grant under Act II of 1874 will remain to be determined should the Administrator-General, on any future occasion, apply for a grant, in a case where it is brought to the notice of the Court that the Administrator-General of another presidency has already obtained administration to the estate of the deceased, or if the Administrator-General of another presidency should, by virtue of his grant, file a suit in our High Court to recover assets, situate within the territory assigned to the Administrator-General of Bengal.

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BROUGHTON, *J.*

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e it is distinctly said by the learned Judges
personal one. Here it is a personal debt.

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LUCHMAN BHARTEE v. DHUKHARAN BHARTEE.

Judgment.

AINSLIE, J.

of one Mobaruck Bhartee, who died some time before that, and who is alleged to have left a will.

Luchman Bhartee claims a certificate under Act XXVII of 1860, as being the person entitled to succeed to the *guddee* of the *Mut*. There is another claimant for a certificate, namely, Dhukharan Bhartee, who is admitted to have been a *Chela* of Rambuksh.

The question before us has nothing to do with the question of the extent of the estate of the deceased Rambuksh, nor with the right of succession to the *Mut*.

The one question which we have to consider is, which of these two persons—the spiritual brother or the spiritual son—is entitled, as representative of the deceased, to collect the debts outstanding due to the personal estate of the deceased Rambuksh, if there are any.

There is on the record a bond by Girdhari and Bheekun Aheer of the 5th of Assin 1283, for the sum of Rs. 51, bearing interest, given to Rambuksh Mohunt of the *Mut* Muttya.

This expression, "Mohunt of the Mut Muttya," may have been used simply for the purpose of identifying the individual to whom the bond was given. There is nothing in the bond from which we can conclude that the money was advanced by Rambuksh out of the funds of the *Mut*, and not out of his own private funds. For the purpose of the present application, we must take it that the bond is on its face a debt due to Rambuksh in person. That being so, the person who is entitled to represent him for the purpose of collecting that debt is his spiritual son Dhukharan, and not his *Gooroo Bhai* Luchman.

The Judge has rejected the applications of both parties, and in support of his order he has cited a decision of this Court in 21 W. R., page 340. But it appears to us that this case is clearly distinguishable from that; because the Judges there say, "it is not for a moment contended that these debts were due to the Mohunt personally: they are due to the endowment, and are not debts of a deceased person at all." It is not our business now to criticize that decision, though it may be observed in passing that the result of it seems to be that in a case, such as the one which the Court was then dealing with, an estate

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LUCHMAN BHARTEE v. DHUKHARAN BHARTEE.

Judgment.

would be left without anybody capable of realizing outstanding debts; and that while litigation was going on for the purpose of determining the person rightfully entitled to the estate, debts due might become incapable of realization.

In the present case we must take it that there is *primâ facie* evidence that the debt was a personal one; and therefore a certificate to collect it should be given to Dhukharan Bhartee, but under the circumstances we think that he ought to be required to furnish security at the time of taking out the certificate to the extent of the debts scheduled by him; and that such schedule should then be annexed to the certificate issued.

The result is, that appeal No. 284 will be dismissed without costs, and appeal No. 286 allowed with costs.

BROUGHTON, *J.*:—

BROUGHTON, *J.*

I concur.

This case is quite distinguishable from the case reported in 21 W. R., because there it is distinctly said by the learned Judges that the debt was not a personal one. Here it is a personal debt.

[CIVIL APPELLATE JURISDICTION.]

1879 *Feb.* 13*th.*

Nos. 1505 & 1506 of 1878.

MAHDUB ALI KHAN AND ANOTHER . . . APPELLANTS;

AND

HOSSAIN REZA KHAN AND OTHERS . . . RESPONDENTS.

Jurisdiction—Document, Non-Registration of—Variance.

A suit was brought, alleging that in a certain deed of compromise entered into, in another suit, between the plaintiff and the present defendants, the names of two of these defendants had been fraudulently and collusively entered as having a share in certain immoveable property, the subject in dispute, and praying for a declaration that these two defendants were not really entitled to any interest in the property under the compromise. The plaintiff failed to prove the allegations of fraud and collusion, and the suit was dismissed as showing no cause of action. On appeal, the Judge in the lower Appellate Court was also of opinion that the plaintiff's suit could not be entertained, but, an objection having been there taken that the deed of compromise was unregistered, decided upon that objection that by reason of such non-registration the document was invalid, and that upon this ground the plaintiff was entitled to a declaration that the two defendants whose names were alleged to have been wrongfully entered, took no rights to virtue of the compromise.

Held, that the appeal ought to have been dismissed by the lower Appellate Court, it not being competent for the Judge to have taken cognizance of the objection as to non-registration where the document was not set up as a ground of title.

APPEALS from an Appellate Decision passed by the Judge of Gya, reversing the decision of the Subordinate Judge.

In these cases which were heard together, it appeared that in a certain suit in which the present plaintiffs were defendants and Laik Bibi and Afzul Bibi (now defendants) were plaintiffs, a compromise was arrived at, and upon that compromise the plaintiff obtained a one-anna share in certain immoveable property, but the compromise, besides settling the matters in dispute between the actual plaintiffs and defendants, recited that certain other persons were entitled to share in the property. The plaint stated that two of the present defendants, Madhub Ali Khan and Khan

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Bahadoor Khan, who had no right by representation or otherwise to any interest in the property, had, in collusion with certain other persons, caused themselves to be entered in the deed of compromise as entitled to a share, and a share had been assigned to them accordingly. The suit, though erroneously described as a suit for reversal of a decree of Court, was really for a declaration that those defendants were not really entitled to a share in the property, and that in so far as any share had been allotted to them the compromise should have no effect as having been entered into fraudulently and collusively. The Court of First Instance dismissed the suit on the ground that the plaintiff had failed to prove the allegations of collusion and fraud, in the execution of the compromise, on the part of the respondents.

In the lower Appellate Court two fresh objections being raised, first, that the alleged compromise was not stamped; and, secondly, that it was not registered—the Judge, though agreeing with the lower Court that the plaintiffs' suit could not be entertained, was of opinion that he was bound to accept the objection as to non-registration, and granted to the plaintiff a declaration that the compromise was an invalid document as between him and the defendant, Madhub Ali Khan and Khan Bahadoor Khan, and that these persons were not entitled to any rights *by virtue of that document.*

Against this declaratory decree these defendants appealed.

Mr. *R. E Twidale*, for the Appellant.

Moulvie *Mahomed Yusoof*, for the Respondent.

The judgment of the High Court (1) was as follows :—

We think it clear that, in the hearing of these cases, the Judge has misconceived the duty of the Court. Upon the original cause of action, as stated in the plaint, the Judge has now found, in concurrence with the Court of First Instance, that the plaintiff had no cause of action, because the allegation on which he came to Court, viz., that the compromise had been fraudulently entered into behind his back and without his knowledge, was wholly improved. Having so found, the Judge has entertained two new

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objections which affected the document on the face of it—one that it was not stamped, and the other that it was not registered. As to the first of these objections, the Judge has declined to give effect to it, because it does not affect the merits of the case; but on the second he holds that want of registration is fatal to the validity of the instrument, and he, therefore, gives effect to the declaration sought for by the plaintiff.

Now, it is clear that the plaintiff would not be entitled to come to this Court merely to ask that an objection, obvious on the face of the instrument, should be declared as depriving it of its validity. He would have no cause of complaint by reason of the absence of registration, because the very facts set out would have shown an entire absence of any cause for the suit, inasmuch as, if the allegations were true, he would have no cause to bring a suit for setting aside that instrument. But in point of fact, the ground on which he sought for relief was entirely different, and that ground has been found to be improved. It is quite clear that the only way in which the Court could take cognizance of the non-registration of this instrument, would be when it is set up as a ground of title in a suit by plaintiff, to recover possession. The plaintiff, we understand, has the intention of bringing such a suit. When he does so, this would be a matter for consideration.

The judgment of the lower Appellate Court will be reversed with costs.

This judgment will apply to No. 1506.

[CIVIL APPELLATE JURISDICTION.]

UMBICA CHURN GOOPTO KOBIRAJ . . . . . } (PLAINTIFF) APPELLANT;

AND

BHOLANATH GHOSAL AND OTHERS . . . . . } (DEFENDANTS) RESPONDENTS.

1879 *March* 10*th*.

No. 1282 of 1878.

Limitation—Decree for Possession—Formal Possession in execution of Decree.

Where a decree for possession is executed and possession delivered to the plaintiff by the Court in the usual way, whether actual possession is obtained thereby or not, the defendant cannot rely thereafter upon a plea of limitation based upon his wrongful possession previous to the execution.

Moonshee Jowhur Ali vs. *Baboo Ram Chand*, 24 W. R., 419, dissented from.

APPEAL from an Appellate Decree passed by the Judge of West Burdwan, reversing the decree of the Moonsiff of that district.

Baboo *Nilmadhub Sen*, for Appellant.

Baboo *Rash Behary Ghose*, for Respondents.

The facts are sufficiently set forth in the judgment of the High Court, (1) which was as follows :—

This is a suit to recover possession of 7½ beegahs of land, upon the allegation that the defendants, who held it as the plaintiff's tenants, were served with a notice by which their tenancy was determined. The Moonsiff decreed the claim, but the lower Appellate Court has reversed that decree upon the ground that the tenancy of the defendants, alleged by the plaintiff, was not proved, and that, on the other hand, the defendants had established adverse possession of the disputed land for more than twelve years.

The plaintiff has preferred this special appeal, and contends that, notwithstanding his failure to prove that the defendants

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held the disputed land as his tenants, he is entitled to a decree upon the other facts found by the Courts below.

These facts are as follow:—The land in dispute was part and parcel of a tenure of eleven beegahs fifteen cottahs, held by the defendants under one Rungomoni Dabi, the putnidar of Lot Senapoti Mehal. Some time before 1864, the rent payable by the defendants fell into arrears, and a suit was brought against them by Rungomoni. A decree having been obtained, in execution of it the tenure was sold and purchased by the decree-holder herself on the 22nd Sraban 1271 (1864). On the 11th September 1865, Rungomoni, not having been able to take khas possession of the tenure, brought a suit to eject the defendants. This suit was decreed in her favor on the 31st January 1865, and in August 1866, formal possession in execution of this decree was given to the decree-holder by an Officer of Court. The plaintiff acquired the rights of Rungomoni in November 1866, by a pottah of the whole eleven beegahs and fifteen cottahs of land executed in his favor by her.

Upon these facts the plaintiff contends that he is entitled to a decree, because in a suit between his landlord and the defendants, the title of the former has already been established, and that the present suit has been brought within twelve years from August 1866, when in execution of the decree passed in that suit, formal possession was delivered to his landlord by a Court Officer.

The title of the plaintiff to the land in dispute is quite clear, but the lower Appellate Court has dismissed the suit as barred by limitation. The District Judge is of opinion that, as the defendants were never dispossessed, notwithstanding the execution of the process of delivery of possession, taken out by Rungomoni, the claim is barred by limitation.

In support of this view he cites two decisions of this Court, one reported in 24 W. R., page 419—*Moonshee Jowhur Ali* vs. *Baboo Ram Chand*, and the other in 25 W. R., page 127—*Mahomed Wali* vs. *Noor Buksh*. The first-mentioned case really supports him; but the facts of the other case are not set forth in the Weekly Reporter, and without them we cannot say whether it is in accordance with the view taken by the District Judge

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this case. So far as the facts are given in the judgment, it ppears to us that all that it decides is, that unless possession s obtained in execution of a decree for possession of land, the lecree-holder cannot maintain a second suit for possession against the same defendants, alleging a fresh disturbance of his possession. But in the present case no such question has arisen. In this case the finding is, that Rungomoni obtained formal possession through the intervention of the Court in execution of her decree against the defendants. The question is, she having not taken any steps afterwards to put the defendants actually out of possession, whether a suit to recover possession brought by her lessee within twelve years from the date of the execution proceedings, would be barred by limitation.

As already observed, the ruling to be found in the 24 Weekly Reporter, page 419, fully supports the view of the District Judge. But it appears to us that the view taken in that case is opposed to the decision of the Judicial Committee in *Gunga Gobind Mundle and others* vs. *Bhopal Chunder Biswas*, 19 W. R., 101. This latter case is noticed by the learned Judge whose judgment is reported in the 25 W. R., but he draws a distinction which it seems to us does not really exist.

From the printed record, the facts of the Privy Council case appear to be these: One Hurnarain Mundle, possessed of large properties, died and left surviving him two sons—Digumber and Rajkristo—and three daughters, the eldest of whom was married to Sumbhoo Haldar, the second to Nobin Tikaree, and the third to Bhopal, the plaintiff in that suit. Digumber died first, and his widow was Romonee Dossee; then died Rajkristo before he was married. Of his sisters, only Sumbhoo's wife at that time had a son named Protap. Shortly after Rajkristo's death Protap also died. It was alleged by the plaintiff in that case that Rajkristo's share first devolved upon Protap, and upon Protap's death upon his father Sumbhoo. Of the properties left by Hurnarain some were in the possession of his aquatic relations, Peary Lall Mundle and others, and the rest in the possession of Romonee Dossee. A deed of gift was executed by Sumbhoo by which out of 8 annas of the properties of Hurnarain, which constituted the share of his youngest son Rajkristo, he gave 2 annas

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to Bhopal and 1 anna to Nobin Tikaree. Sumbhoo brought a suit against Romonee Dossee and the Mundles to recover the properties of Rajkristo. While this suit was pending, Sumbhoo sold his rights to one Joykristo, who got himself substituted for his vendor as plaintiff in the action. A decree was passed in favor of Joykristo for 8 annas of the properties left by Hurnarain. Against this decree Romonee alone appealed, and it was modified, so far as the properties in her possession were concerned, to 5 annas share. In execution of this decree Joykristo obtained possession of the 5 annas share decreed, in the way in which possession is delivered in execution of decrees. Joykristo afterwards sold all his rights to the Mundles. Bhopal, then under the deed of gift, referred to above, brought the suit in question against the Mundles to recover possession of 2 annas of Hurnarain's properties which at the time of Hurnarain's death were in their possession. The suit was instituted within twelve years from the time when Joykristo obtained possession in execution, but more than twelve years from any of the following dates, viz., (1) when wrongful possession was first taken by the Mundles; (2) when Hurnarain died; and (3) when the deed of gift was executed by Sumbhoo in favor of Bhopal.

The main defence raised in the suit was limitation. With reference to this question, their Lordships of the Judicial Committee observe: "Joykristo executed the decree under which a 5-annas share was delivered to him in the manner in which delivery is made under executions of decrees for land in the possession of ryots, viz., by beat of drum, and the affixing of bamboos; and he filed a receipt for the same in the Court of the Principal Sudder Ameen. *The decree and execution put an end altogether to limitation. It is immaterial whether Joykristo obtained actual possession or not.*" It is quite clear from this passage that the Judicial Committee have held that when a decree for possession is executed and possession delivered in the usual way, whether *actual* possession is thereby obtained or not, the defendant cannot thereafter successfully rely upon the plea of limitation, based upon his wrongful possession previous to the execution.

In the decision reported in 24 W. R., 419, Mr. Justice MARKBY, referring to the Privy Council case, thinks that

it does not lay down this proposition, and the only ground he assigns for this opinion is, that the Privy Council record shows that the Mundles never questioned the fact that Joykristo obtained possession of 5 annas share of the properties decreed in his favor. This is true, but the Judicial Committee decided the question of limitation quite irrespective of the admission of the Mundles upon this point. And the Privy Council record shows the reason why this admission was not made the basis of their decision. The record shows that, although the Mundles admitted the fact of Joykristo's possession, the plaintiff Bhopal, on the other hand, alleged that Joykristo was a mere *benamdar* for the Mundles, and their Lordships of the Judicial Committee were of opinion in the passage quoted above that the suit was not barred by limitation, even if Joykristo being a mere benamdar did not obtain actual possession.

The result, therefore, is that the decision of the lower Appellate Court in this case on the question of limitation is contrary to the ruling in the Privy Council case above referred to. It has been already shown that there cannot be any question as to the plaintiff's title. The decision of the lower Appellate Court must therefore be reversed, and the plaintiff's suit decreed with costs in all the Courts.

[CIVIL APPELLATE JURISDICTION.]

1879
Feb. 6th.

No. 224 of 1878.

BABOO LUCKY NARAIN ROY CHOWDHRY . . } (DECREE-HOLDER) APPELLANT;

AND

KALLY PUDDO BANERJEE . . . . . } (JUDGMENT-DEBTOR) RESPONDENT.

Mesne profits, Calculation of—Interest.

A decree-holder who had been wrongfully kept out of possession from a portion of certain lands belonging to him, brought a claim for wasilat for the time during which he had been so wrongfully kept out of possession. *Held*, that in calculating such wasilat, the Court ought to have ascertained by comparison with the amounts actually received from the portion of the lands which remained in the decree-holder's possession, what he would have realized had the arrangement prevailing at the time of dispossession subsisted all along, and upon that, and not upon what the party in wrongful possession did really realize, or might by good management have realized, to have estimated the wasilat.

Held, also, that interest may be allowed upon the amount of wasilat found due. *Hurro Pershad Roy* vs. *Shama Pershad Roy*, I. L. R., 3 Cal., 654, and 1 C. L. R., 499; and *Rodger* vs. *The Comptoir d'Escompte de Paris*, L. R., 3 P. C., 465, followed.

APPEAL from an Original Order passed by the Officiating Judge of Cuttack.

Mr. *R. E. Twidale*, for the Appellant.

No one appeared for the Respondent.

The facts are sufficiently set forth in the following judgment of the Court (1) which was delivered by

BIRCH, *J.* BIRCH, *J.*:—

In this case we think that the order of the Judge cannot be supported, as he has proceeded upon a wrong principle. It seems that some accounts were filed by the decree-holder, showing the rents payable by the farmer of the estate under the

(1) BIRCH and MITTER, *J.J.*

arrangement subsisting before the dispossession; but they have not been sent up to this Court. Probably they have, by mistake, remained in the lower Court. The principle upon which wasilat should be estimated in this case is to ascertain from the decree-holder what sum he has realized in respect of the seven annas share which remained in his possession, during the years for which wasilat is claimed, and on a comparison of his account as to that seven annas, it will be easy to fix the proportionate amount due upon the nine annas share from which he was dispossessed under the decree of this Court.

The Judge remarks that the point he has to consider is not what the decree-holder might, by another course of management, have realized during the period in question, but what the party in wrongful possession did really realize, or might by good management have realized. In this view we cannot agree with the Judge. What he has to consider is, what the decree-holder would have realized had the arrangement prevailing at the time of dispossession subsisted all along, and upon that he should estimate wasilat. In this view of the case the question regarding the allowance of collection charges will not arise.

There is a further prayer, that interest may be allowed on the wasilat. On this point the Judge says: "I do not think it is within my power to award such interest, and I accordingly reject this part of the claim." In this view also we think the Judge is wrong. The question of allowing interest upon mesne profits has often been decided by the Courts in the country, and has also come under the consideration of their Lordships in the Privy Council. One decision to which we have been referred is in I. L. R., 3 Cal., p. 654, and there is another case (*Rodger* vs. *The Comptoir d'Escompte de Paris*) reported in L. R., 3 P. C., 465, in which the following remarks are made: "It is contended on the part of the respondents here, that the principal sum being restored to the present petitioners, they have no right to recover from them any interest. It is obvious that, if that is so, injury, and very grave injury, will be done to the petitioners. They will, by reason of an act of the Court, have paid a sum which it is now ascertained was ordered to be paid by mistake and wrongfully. They will recover that sum after the lapse of a considerable time, but they will recover

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BABOO LUCKY NARAIN ROY CHOWDHRY v. KALLY PUDDO BANERJEE.

Judgment.

BIRCH, *J.*

it without the ordinary fruits which are derived from the enjoyment of money. On the other hand, those fruits will have been enjoyed, or may have been enjoyed, by the person who by mistake and by wrong obtained possession of the money under a judgment which has been reversed. So far, therefore, as principal is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the petitioners, and that the perfect judicial determination, which it must be the object of all Courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them, have the money restored to them with interest during the time that the money has been withheld. * * * * * * * * * Their Lordships have reason to believe that the practice of the Courts in India, where there has been a reversal in this country, and when money has been ordered in India to be paid back, in consequence of that reversal, is to order the payment of interest. Their Lordships, therefore, so far as any precedents applicable to the case are concerned, believe that the precedents will be found to be in favor of a restitution of the money with interest."

The case must go back to the Judge that he may re-consider it with reference to the above remarks.

The appellant is entitled to his costs of this appeal.

[CIVIL APPELLATE JURISDICTION.]

DOLI SATI AND ANOTHER . . . . . APPELLANTS; 1879 *March* 17*th*.

AND

SYED IKRAM ALI AND ANOTHER . . . . . RESPONDENTS. No. 1333 of 1878.

Parties—Suit to eject tenant of a joint fishery.

A suit will not lie to eject a tenant of a joint fishery unless all the joint proprietors are joined as parties.

APPEAL from an Appellate Decree passed by the Judge at Cuttuck.

Baboo *Anundo Gopal Palit*, for Appellants.
Mr. *R. E. Twidale*, for Respondents.

The facts are sufficiently set forth in the judgment of the High Court (1) which was as follows :—

The plaintiffs' case is that they, as Mokuddums of a 13 annas 6 gundas share of a julkur, have demanded an enhanced rent for their share of a fishery from the defendants after serving a notice calling upon them to pay an extra rent for the fishery; that the defendants refusing to pay any increase of rent continue to fish as before. The plaintiffs, therefore, sue in the terms of the plaint to dispossess the defendants.

The defendants' answer is, that they have acquired a right of occupancy in the julkur, and cannot be deprived of their right.

The Moonsiff points out that no question of right of occupancy can arise in the case; but he says that, as the tenants have received notice to pay a higher rent, and been informed that if they decline the plaintiffs' terms, they must cease to fish in the julkur, there is nothing to prevent the plaintiffs from recovering khas possession.

In appeal before the District Judge, the main objection raised was, that as the plaintiffs were only proprietors of a portion of the fishery, they could not sue to dispossess the defendants, unless

(1) BIRCH and MITTER, *J.J.*

1879

DOLI SATI v. SYED IKRAM ALI.

Judgment.

their co-sharers joined them in the suit. The Judge considered that, as this point had not been raised in the Court of First Instance, it was too late to entertain it. He was of opinion that there was no reason why plaintiffs should not be allowed to hold joint possession of their 13 annas 6 gundas share of the fishery with the defendants as tenants of the 3 annas share. The 3 annas shareholders would not join the plaintiffs in the suit, and they evinced no wish to interfere with the defendants' possession of their share of the fishery. The Judge confirmed the order of the first Court, and gave the plaintiffs a decree for joint possession in the fishery to the extent of 13 annas 6 gundas.

It is urged before us that the Judge was bound to try the question whether the plaintiffs, as proprietors of portion of a joint fishery, could bring a suit to eject the defendants, and this being a point of law, we are bound to entertain it.

We think that a suit framed as this is, will not lie. The fishery is joint property, the rent payable to the proprietors of the 13 annas share, and to the owner of the 3 annas share is paid according to arrangement between the shareholders. But unless the whole of the proprietors join in a suit to eject the defendants by terminating the tenancy, the suit will not lie. The provisions of Act VIII of 1859 are not applicable in a case of this description; but the principle upon which it has been held that in cases brought under that Act, a co-sharer cannot sue to enhance rent, applies here. The original lease granted by all the proprietors cannot be varied or terminated at the suit of one.

The appeal must, therefore, be allowed, and the suit must be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

BISHOKA DASIA AND ANOTHER (PLAINTIFFS) APPELLANTS; AND ANUNTO LALL PANI AND OTHERS (DEFENDANTS) RESPONDENTS.

1879. *March 17th.*

No. 667 of 1878.

Award—Arbitration, Submission to, by one of several defendants.

A, having brought a suit against B, and two of his tenants, for possession of certain lands of which he alleged he had been dispossessed by the defendants in 1279, it was arranged between A and the defendant B that the matter should be referred to arbitration. Arbitrators were accordingly appointed, and their award having been given in favour of A, judgment for the plaintiff was recorded in terms of that award. B then appealed on the ground that the other defendants had not joined in the agreement to submit the matter to arbitration, and the judgment was set aside and the case remanded for re-trial.

On remand the plaintiff's suit was dismissed, and the order of dismissal was upheld by the lower Appellate Court. *Held*, on further appeal by the High Court, that the fact of the tenants not having joined in the submission to arbitration, did not vitiate the award, and that as between A and B the original decision of the Court of First Instance in terms of that award must be restored.

APPEAL from an Appellate Decision, passed by the Judicial Commissioner of Chota Nagpore.

Baboo *Sreenath Doss*, and Baboo *Golap Chunder Sircar*, for the Appellants.

Baboo *Nil Madhub Sen*, for the Respondents.

The facts are sufficiently set forth in the judgment of the High Court (1) which was as follows :—

In this case a dispute arose between the plaintiffs and the defendant, Anunto Lall Pani, regarding certain plots of land lying on the confines of Mouzah Mukundpur and Mouzah Fulbaria. The plaintiffs allege that they were dispossessed by Anunto Lall Pani in Joyshto 1279—first of a small portion, and subsequently of the remainder of the lands in dispute.

(1) BIRCH and MITTER, *J.J.*

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BISHOKA DASIA v. ANUNTO LALL PANI.

Judgment.

Anunto Lall and his tenants are made defendants in this suit. The defendants contend that the land in dispute belongs to the panchuki brahmuttur of Anunto Lall falling within Fulbaria.

The dispute was by consent of the plaintiffs, and Anunto Lall referred to arbitration, and the arbitrators gave their award on the 25th September 1875. In accordance with the terms of this award, the Extra Assistant Commissioner on that date passed a decree, over-ruling the objection raised by Anunto Lall. The latter appealed against this decree to the Deputy Commissioner, and upon the ground that only one of the three defendants agreed to submit the dispute to arbitration. The Deputy Commissioner set aside the decree based upon the award, and remanded the case for a trial on the merits.

The Moonsiff then went into the case, and dismissed the suit. On appeal, the Officiating Judicial Commissioner upheld the Moonsiff's order, and against that order this special appeal is preferred.

It is contended here that inasmuch as the principal defendant, the holder of the tenure and the plaintiff, agreed to submit their disputes to arbitration, the Deputy Commissioner was not authorized to set aside the award, because the other defendants, tenants of the principal defendant, had not joined in the submission. It appears to us that the submission to arbitration having been acquiesced in by the plaintiff and the principal defendant, the mere fact that Anunto Lall's tenants did not join in the application does not vitiate the award. The rights of the tenants cannot be affected by that award, their cultivation cannot be disturbed thereby. As between Anunto Lall and the plaintiff, the award is binding, and the tenant defendants cannot, in execution of the decree based upon that award, be disturbed or deprived of any rights they enjoyed previous to the submission.

The judgments of the Deputy Commissioner, the Officiating Moonsiff, and the Judicial Commissioner, must be reversed, and the decree of Baboo Krishto Persad Chowdhri, Extra Assistant Commissioner, dated the 25th September 1875, so far as it affects Anunto Lall alone, must be restored, but the plaintiff's suit as against the other defendants will be dismissed. The costs of the plaintiffs in the litigation subsequent to that decree must be borne by Anunto Lall. The tenant defendants to bear their own costs.

[CIVIL APPELLATE JURISDICTION.]

ROYNARAIN DASS . . . . . APPELLANT;

AND

NOWNIT LALL . . . . . RESPONDENT.

1879
March 17th.

No. 312 of 1877.

Mitakshara joint estate—Sale in execution of a son's share—Rights of Purchaser.

The right, title and interest in the joint estate of a son belonging to a joint family under Mitakshara law may be sold in execution of a decree against such son.

Deendyal Lal vs. *Jugdeep Narain Singh*, L. R., 4 I. A., 247, followed.

REGULAR APPEAL from a decision of the Subordinate Judge of Patna.

The plaintiff, as manager of a joint family, brought a suit for removal of attachment from, and for confirmation of possession of a four-annas share, belonging to the family, of certain lands, which had been attached in execution of a decree upon a bond by one Roynarain Dass, making his son and Roynarain both defendants.

The defendants gave no evidence to show that the family had in any way benefited by the loan secured by the bond, or that any inquiries, as to whether it was for the use of the family, had been made by Roynarain when the loan was advanced, while from the bond itself it seemed that the loan was for the personal use of the plaintiff's son.

From the evidence of the witnesses examined by the plaintiff, it appeared that the property sought to be sold was ancestral and undivided; and it was alleged that being so, it could not, under Mitakshara law, be sold for a debt contracted by a single member of the joint family for purposes not benefiting the family.

The Subordinate Judge was of opinion that, under these circumstances, the plaintiff was entitled to a decree for removal of the attachment and confirmation of possession.

The defendant Roynarain now preferred this appeal.

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ROYNARAIN DASS v. NOWNIT LALL.

J. D. Bell (Officiating Advocate-General), Mr *C. Gregory*, and Moonshee *Mahomed Yusoof*, for the Appellant.

Baboo *Chunder Madhub Ghose*, and Baboo *Prannath Pundit*, for the Respondent.

Judgment.

The judgment of the High Court, (1) which is as follows, was delivered by

GARTH, *C.J.*

GARTH, *C.J.* :—

We think that this case is quite undistinguishable in principle from that of *Deendyal Lall* vs. *Jugdeep Narain Singh*, reported in L. R., 4 Indian Appeals, 247.

It was there held by the Privy Council that, where a decree has been obtained against the father of a joint Hindu family, governed by Mitakshara law, his interest in the family property could be sold under the decree; and that what the purchaser bought under such a sale was the right which the father had as a member of the family to a partition, by means of which the extent of his share would be ascertained, and that share would then become the purchaser's property.

The only difference between that case and this is, that here the member of the joint family against whom the decree has been obtained is not the father of the family, but the son; and an attempt has been made by Baboo Chunder Madhub Ghose to show that the son is not in the same position as the father, because he would not, except under circumstances, be entitled to a partition as against the father. But it has been held by a Full Bench of this Court that a son is entitled to a partition against his father (see *Raja Ram Tewary* vs. *Luchmun Pershad*, 8 W. R., p., 15).

There is nothing in the judgment of the Privy Council which leaves us to think that the principle which their Lordships lay down is not applicable to the case of any member of the joint family; and our attention has been called to a case in this Court, which does not appear to have been reported (Special Appeal No. 2038 of 1877), in which it was decided by Mr. Justice JACKSON and Mr. Justice TOTTENHAM, that where the facts were precisely similar to those of the present case, the interest of the son would pass to the purchaser by a sale under the decree.

GARTH, *C.J.*, and PRINSEP, *J.*

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ROYNARAIN DASS v. NOWNIT LALL.

Judgment.

GARTH, *C.J.*

Then another point has been raised in this appeal, viz., that as the subject-matter of attachment was a four-annas share of certain property belonging to the joint family, and not merely the right, title and interest of the judgment-debtor, (the son) in the property, the Court is bound to prevent the sale.

But as we understand the facts, the judgment-creditor (whatever the form of the attachment may have been) only proposes to sell the right, title and interest of the judgment-debtor; and we find that the third issue raised in the Court below was, "Has the defendant No. 2 such an interest in the joint family property that it is liable to sale in execution of the decree against him?"

The parties, therefore, evidently meant to raise the question, whether the right and interest of the judgment-debtor could be sold; and as the object of this suit was to prevent the sale, not only of the entire property which may have been attached, but also of any interest in it, we think that we ought clearly not to interfere to prevent the sale of such right, title and interest as the judgment-debtor has.

The judgment of the lower Court will, therefore, be reversed, and the plaintiff's suit will be dismissed with costs in both Courts.

[CIVIL APPELLATE JURISDICTION.]

1879 *March 24th.*

No. 269 of 1878.

MUSSAMUT BIBEE BUDHUN, JUDGMENT-DEBTOR . . . . . } APPELLANT;

AND

MUSSAMUT HAFEZAH AND OTHERS, DECREE-HOLDERS . . . . . } RESPONDENTS.

Joint Decree—Discharge by one of several joint decree-holders—Execution of joint Decree—Act VIII of 1859, *section* 207—*Act X of* 1877, *section* 231.

The representatives of one of several decree-holders conveyed his interest in the decree to A. Some time afterwards A filed a petition in Court, stating that the decree had been satisfied out of Court, and the case was thereupon struck out as far as he was concerned. Subsequently the other decree-holders applied for execution of their share of the decree, but it was objected that the decree had already been satisfied by payment to A.

Held, that the other decree-holders were entitled to proceed with execution for the amount of their share, a joint decree-holder having no power to give a discharge out of Court to a judgment-debtor for more than his own share in the decree.

APPEAL from an order passed by the Officiating Judge of Patna.

Baboo *Sreenath Dass*, Moonshee *Mahomed Yusoof*, and Baboo *Rajendro Nath Bose*, for the Appellant.

Mr. *R. E. Twidale* and Mr. *M. L. Sandel*, for the Respondents.

The facts are sufficiently set forth in the following judgment of the High Court (1) which was delivered by

AINSLIE, J. AINSLIE, J.:—

In the suit brought by Bibee Budhun against Imdad Ali a decree was passed on the 8th of March 1861, which eventually was carried before Her Majesty in Council, and was disposed of finally in the year 1872. The final order modified the orders

(1) AINSLIE and BROUGHTON, J.J.

of the Courts in India, and in lieu of them, made an order in favour of the plaintiff, in respect of a portion of the claim, and dismissed her suit in respect of certain portion of the property included in the plaint. Proceedings had been taken in the meantime for the execution of the decree, and the result was, that on this order of Her Majesty in Council the defendants were entitled, by way of restitution, to recover certain property with mesne profits.

The proper mode of dealing with this decree in execution would have been to ascertain the amounts respectively due to the two parties, to set off the smaller amount against the larger, and only to allow execution to proceed for the balance. But the case has been treated as two separate decrees to be separately executed; and we have before us now the decree of the original defendants against the original plaintiff.

Certain persons who were representatives of one of the original defendants, Imdad Ali, on the 24th April 1877, conveyed their interests in the decree to one Omur Kurreem, and on the 29th of August of the same year he applied to the Court to enter his name in the decree in the place of the names of those persons. Having done this, on the 27th May of the following year, he made a petition to the Court, in which he stated that the decree had been satisfied in full, and that the judgment-creditors had now no longer any claim against the judgment-debtors.

On the 5th of June following, an order was made, which was read to us by Baboo Sreenath Dass, as if it had been an order striking the case off the file altogether on the ground of the decree being satisfied. But it has been pointed out to us that the order was not in these terms, and that the Court only disposed of the case in respect of the particular creditor who made the application.

It appears to me that the learned pleader ought to have been more careful in examining the order before he made the statement to the Court, and that a great deal of the time which had been occupied in the discussion of the case might have been saved, if it had been pointed out at the outset that the order was a limited one.

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Judgment.

AINSLIE, J.

It is contended that the effect of this order is to discharge the judgment-debtor entirely; but it seems to us perfectly clear that this cannot be so. It will be seen on reference to section 207 of the Code of 1859, which has been re-produced in section 231 of the Code of 1877, that one or more of several joint decree-holders, or his or their representatives, is, or are, entitled to proceed with the execution of a decree only with the special leave of the Court, and that even when such leave is granted, it is the duty of the Court to pass an order for the protection of the interests of the absent decree-holders. If, then, one of several joint decree-holders must obtain the leave of the Court before he can proceed with the execution of his decree, and if even then the Court is bound to protect the interests of absent decree-holders, it seems perfectly clear that no decree-holder can assume to himself the power of giving a discharge out of Court for the full amount of the decree; and that any judgment-debtor who chooses to pay over the amount due under the decree to a single decree-holder authorized by his co-decree-holders to give a discharge, does so at his own risk, and remains responsible to the decree-holders.

A case was cited from 3 Calcutta Law Reports, page 513, (*Brojeswari Chowdhranee* vs. *Tripoora Soonderee Debi*,) in support of the contention of the appellant. It appears to us on the contrary that, when examined, this case is rather against than in support of it, and shows that no creditor can give a discharge in respect of any portion of a decree larger than his own share.

Then it is said that this application for execution is altogether barred by limitation, inasmuch as the last application is dated the 23rd of December 1876, and the next previous application was on the 16th of December 1872, that is, more than four years before.

To this there are two complete answers. One is, that under section 21, Act VI of 1874, the period for executing an order of Her Majesty in Council is twelve years from the date of such order. The second is, that it is evident from the proceedings taken that the application of December 1876 was really nothing more than an application to the Court to resume pending proceedings, at the stage at which they had been suspended. The

application itself refers to a previously existing attachment, and it is admitted that no new attachment was made: but the Court went on and issued proclamation of sale on that pre-existing attachment, the order by which the previous application was removed from the file, but with a provision for the continuation of the attachment is not on the record before us; but it is quite evident from the materials that we have here, that there must have been such an order, and that the proceedings taken by the Court below were merely by way of continuance of a previously suspended proceedings. It may, no doubt, be true that the former order directed that the application should be taken off the file, but that part of the order must be read with the circumstances accompanying it; and when we find that there was a continuing attachment subsequently recognized by the Court as valid, the only conclusion we can arrive at is, that that order was wrongly worded, and that it was in fact nothing more than an order to suspend proceedings *sine die* in consequence of appeals then pending.

The petitioners for execution have asked to be allowed to proceed with the execution of the decree, stating that their interest therein is two and a half annas, and that the interest which was conveyed to Omur Kurreem did not exceed three annas of the property in dispute, the total amount in suit being five and a half annas.

We think that the petitioners are entitled to proceed with the execution of their decree as for the whole decree after giving credit to the judgment-debtors for a part payment, amounting to a three-annas share of the whole.

The appeal must, therefore, be dismissed with costs.

[REVISIONAL JURISDICTION.]

1879. *March 12th.* MUSSAMUT JAMEELA . . . . . PETITIONER;

AND

No. 146 of 1879. LUCHMUN PANDAY . . . . . OPPOSITE PARTY.

Execution of decree—Investigation of claims—Act X of 1877, sections 278, 279, 280.

In a suit upon a mortgage upon a house, one of the defendants alleged in his written statement that he had purchased the house at an auction sale in execution of a decree against his co-defendants, but that he had since sold and conveyed the same to A, who had been put into and had held possession from the time of the sale to her, and further that the mortgage was collusive. A was not made a party to the suit. The plaintiff obtained a decree and proceeded to execute it by attachment and sale of the house. A thereupon objected that the house was not liable to be attached and sold in execution of a decree in a suit to which she was not a party, and alleged that it had been purchased and held by her prior to the suit, and that the mortgage bond was fraudulent and collusive. The Moonsiff dismissed her petition, on the ground that she was bound by the decree, her vendor having been made a party to the suit.

Held, that the Moonsiff was bound to have investigated her claim according to the provisions of sections 278—280 of Act X of 1877.

THIS was a Rule to show cause why an order of the Moonsiff of Gya, dated 23rd November 1878, should not be set aside. The circumstances were these:—

At an auction sale in execution of a decree, passed against Chamari Sahoo and Nathoo Sahoo (two of the judgment-debtors in the present case,) Goordyal Lall (also a judgment-debtor in the present case) purchased a house belonging to Chamari and Nathoo. This house was, on the 6th May 1873, conveyed by Goordyal to Mussamut Jameela, the present petitioner. Subsequently a suit was brought by one Luchmun Panday in the Court of the Moonsiff of Gya, on a mortgage bond, dated the 1st Bhadur 1271 F.S., against Chamari, Nathoo and Goordyal, for liquidation

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of a mortgage debt (Rs. 447), by sale of the house which was the subject of the alleged mortgage. Goordyal, in his written statement, stated that he had purchased the house as above stated, and, on the 6th May 1873, had conveyed it to the petitioner, and that, therefore, the petitioner ought to have been made a party. He further stated that the mortgage bond was a collusive one.

On the 14th November 1877 the Moonsiff decided the case, giving a decree to the plaintiff, and stating in his judgment that, as the decree could not affect the interest of one who was not a party to the suit, yet that it was sufficient for the purpose of this suit that Goordyal, whose *locum tenens* the petitioner was, had been made a party. In execution of this decree the house had been attached and notified for sale, when the petitioner, on 24th September 1878, presented to the Moonsiff a petition of objection, alleging that, as she had not been made a party to the suit, the house, which she had purchased, and which has been in her possession prior to the suit, was not liable to be sold in execution of the decree, and that the mortgage was a fraudulent and collusive one. On this petition of objection the Moonsiff, on the 23rd November 1878, passed an order that the decree was binding on the petitioner since it was passed in the presence of her vendor Goordyal.

The petitioner then applied to this Court to set aside the order of the Moonsiff on the ground:—

1*st.*—That the Moonsiff had no jurisdiction, in execution proceedings, to make such an order against the petitioner who was not a party to the decree;

2*nd.*—That the Moonsiff ought to have proceeded on the said petition of objection according to the provisions of sections 278 to 280 of Act X of 1877; and

3*rd.*—That the judgment-debtors had no interest whatever in the house, at or after the institution of the decree-holder's suit, and that, therefore, Goordyal did not represent the interest of the petitioner.

Moonshee *Serajul Islam*, for Petitioner.

Mr. *H. E. Mendies*, for Opposite Party.

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Judgment.

AINSLIE, *J.*

The following judgment of the High Court (1) was delivered by

AINSLIE, *J.*:—

In the present case the order of the Moonsiff was entirely wrong.

The property having been attached in execution of decree, an objection was made on behalf of a person who claimed to be in possession of the property as its owner. Under such circumstances, under sections 278 to 280 of the Code of Procedure, the Moonsiff was clearly bound to make an investigation with reference to the provisions of the law. What he did was to refuse to make any such investigation, and to dispose of the objection upon grounds of a totally different character, and which cannot properly be considered as an adjudication under section 278.

We think that the refusal of the Moonsiff to do that which the law distinctly required him to do, amounts to a refusal to exercise jurisdiction. Therefore, under section 622, this Court sets aside the order of the Court below, and directs that Court, after holding a proper enquiry, to determine whether the claimant is in possession of the property which has been attached in execution of decree, and if in possession of that property, whether she is so on her own account, or as a trustee for the judgment-debtor. If it is found that she is in possession and not a trustee for the judgment-debtor, it is clear that the property in her possession cannot be sold in execution of a decree against the judgment-debtor in a suit to which she was no party, and which was instituted, if her statements are true, after the interest of the said debtor had entirely ceased.

The Rule will be made absolute with costs.

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[CIVIL APPELLATE JURISDICTION.]

1879
March 3rd.

Nos. 235, 242 and 245 of 1877.

SREEMUTTY HORI DASI . . . . . APPELLANT;

AND

THE SECRETARY OF STATE FOR INDIA AND OTHERS . . . . . RESPONDENTS.

Will, Construction of—Absolute Estate—Words of limitation—Puttro Poutradi.

The testator, a Hindu, died in 1874, leaving him surviving a widow and H. D. a daughter's daughter, and a brother R. L. By his will, after providing that in the event of his leaving no son, son's son or son's grandson, his widow should take the estate and enjoy the profits thereof for life, and that on her death, in the event of daughters being born to himself, they, or on their death, their sons, should take, the testator directed (passing over his next heir R. L.) that on failure of the heirs already mentioned his daughter's daughter H. D. "shall be owner of my property, and without dispute shall possess the same to her sons and son's sons, in succession (*'puttro poutradi'*)," except that, if she should "be barren (*avira*) or a childless widow or otherwise disqualified, she shall not become entitled to my property, but shall receive an allowance of Rs. 300 per mensem for life;" and further that in the event of failure of heirs as above, and of the disqualification of H. D., the whole of the property should vest in the Government for certain charitable purposes.

Held, that the testator's intention was to confer, in the certain events mentioned, on H. D. if she lived, and was qualified at the death of the widow, not a life interest, but an absolute estate, to the exclusion of R. L.; and that, as the conditions imposed were neither repugnant to Hindu Law nor inconsistent with the nature of the gift, that object had been effectuated.

Held, also, that the gift of the reversion to the Government in case of H. D. not surviving or of being disqualified was good and valid.

In the absence of anything showing an intention to limit their signification, the words "*puttro poutradi*," being first in the category of heirs, may be taken to refer to heirs generally, and not to be limited to heirs male.

REGULAR APPEALS from a decision of the Judge of Hooghly.

In this case the Secretary of State, on behalf of the Government as trustee of the last will of Behari Lall Mookerjee, brought

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Statement.

an administration suit to obtain certain moneys left for charitable purposes, and also to obtain a declaration of the rights of the several parties thereunder, with a scheme for the due administration of the trust.

Behari Lall Mookerjee died on the 12th August 1874, possessed of considerable property, leaving him surviving a widow, Komoleh Kamini Dasi, but no descendants, except a daughter's daughter Hori Dasi Dabi. He had a brother, Ram Lall Mookerjee, who also survived him.

By his will the deceased left all his property, subject only to a charge of Rs. 50,000 for the establishment of a school and dispensary, and to a further charge for certain religious services, to his widow in the event of his leaving no son, grandson or great grandson to him, living at the time of his death; and upon her death, should there be no daughter or daughters born to himself, or son or sons of such daughter or daughters in existence, to Hori Dasi in these terms:—"Sreemutty Hori Dasi Dabi shall be owner of my property, and without dispute shall enjoy and possess the same to her sons and son's sons in succession (*'puttro poutradi'*)." The will, however, went on to say:—"If my granddaughter be barren or a childless widow, or if she be otherwise disqualified, she shall not become entitled to my property, but shall receive an allowance of Rs. 300 per mensem for life;" and further if "no son or daughter be born to me, and if my granddaughter dies before she becomes a mother, or if she be barren or a childless widow, or be disqualified otherwise, the whole of my properties shall vest in the Government," for certain specified purposes.

This will, therefore, entirely passed over Ram Lall Mookerjee, the next heir on death of the widow. The chief object of the testator in making the will seems to have been to disinherit his brother with whom he had been for years on bad terms.

The Judge being of opinion that the terms *puttro poutradi* used in the words of gift to Hori Dasi were limited to descendants in the male line, and that the gift to her was, therefore, void as being an attempt on the part of the testator to create an estate unknown to the Hindu law, and opposed to the rule laid down in the Tagore case, decided that Hori Dasi could only take a life estate

on the death of her mother, should she survive and not be otherwise disqualified, and further that reversion to the Government was null and void.

Against this decision appeals were presented by all the parties.

Paul (Advocate-General,) Baboo *Unoda Pershad Banerjee* with him, for Secretary of State.

J. D. Bell, Baboo *Umbica Churn Banerjee* with him, for Komoleh Kamini Dasi and Monee Lall Banerjee and Gopal Chunder Ghosal.

Woodroffe, Baboos *Aushotosh Dhur* and *Umbica Churn Bose,* for Hori Dasi Dabi.

Montriou and *Evans,* Baboos *Nemy Chunder Bose, Umbica Churn Ghose* and *Kisto Komul Bhuttacharjee,* with them, for Ram Lall Mookerjee.

The following judgments were delivered by the High Court (1) :—

JACKSON, *J.* :— JACKSON, *J.*

These three appeals arise out of the decision of Mr. PRINSEP, then District Judge of Hooghly, in a suit filed on behalf of the Secretary of State for the purpose of "carrying out the trusts of the will of the late Behari Lall Mookerjee, or, as more fully expressed at the close of the plaint, with the objects that the authority and the validity of the said will may be declared, and that the said Komoleh Kamini Dabee, defendant No. 1, be directed and enjoined to make over to the Collector, or such other trustee or trustees as the Court may appoint, the sum of (Rs. 1,50,000) one lac and fifty thousand rupees in Government securities for the establishment of the aforesaid school and hospital, and a further sum of Rs. 1,000 for the furnishing of the said school and dispensary, and further that the rights of the several parties under the will may be ascertained and determined, and that a scheme for the due administration of the trust under the will may be propounded with such other relief as the Court may think fit to grant."

Behari Lall Mookerjee was a wealthy Hindu gentleman, residing at Boinchi, in Zillah Hooghly. He had a brother named Ram

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Lall, who, in ordinary circumstances, would, in the absence of issue and after the wife, have been the heir of Behari Lall, but with whom he, Behari Lall, had been for years notoriously on bad terms.

It appears that on the 26th Assin 1272, or the 11th October 1865, Behari Lall made a will which he deposited in the Burdwan Registry Office, but which he afterwards withdrew, and on the 25th Srabun 1277, or 9th August 1870, he made a fresh will which was in like manner deposited in the Burdwan Registry Office, and which is now under consideration.

Behari Lall, it seems, never had a son, but a daughter had been born to him, named Benodine, who before the making of the first will, had died leaving an infant daughter Hori Dasi, then "very young," and who in fact is still a minor, (she was born apparently in September 1865 from the evidence of her father.)

The testator (I speak of him as such, because the factum of the will is no longer in dispute) died on the 12th August 1874 in middle age.

The alleged will having been executed before the Hindu Wills Act came into force, the provisions of that Act were not applicable to it, but on the 16th September 1874, the widow Komoleh Kamini filed her petition in the District Judges' Court for a certificate under Act XXVII of 1860, claiming expressly under the will.

This application of hers was opposed by the brother, Ram Lall, who, in his petition filed on the 7th December 1874, in the strongest terms, impugned as well the authenticity as the legal validity of the will. He said: "The will alleged by the petitioner is fraudulent. I totally deny the genuineness of it. The petitioner has, in collusion with her brother-in-law (sister's husband) Seetanath Bundopadhya, and his brother Sreenath Bundopadhya deceased, and her servant Rakhal Doss Chowdhry, got up the said will. The late Behari Lall Mookerjee did not sign it," and other words to the same effect.

The certificate case was heard by Mr. PRINSEP. Ram Lall himself appears to have been examined in open Court on the day of filing his petition. The judgment delivered on the 9th January 1875 went very fully into the evidence, touching the making of

the will, found in favour of it and pronounced the widow entitled to the certificate thereunder.

Ram Lall was dissatisfied, and appealed to this Court. The appeal was heard by my brother McDONELL and myself, and we held that, as the applicant for the certificate was the widow, and in the circumstances there could be no possible question as to her right, the Judge ought not to have inquired into the factum of the will, which, for the purposes of the case, was a matter wholly immaterial, and we consequently annulled the finding on that question, merely declaring Komoleh Kaminee entitled to the certificate generally.

Our judgment was delivered on the 25th May 1875.

It appears that about two months before this, that is on the 24th March, a correspondence had begun between the widow and the Collector of Hooghly, which continued for some months, the Collector pressing Komoleh Kaminee to give immediate effect to the certain dispositions of a charitable kind contained in the will, and she stating her difficulties. The suggestion came from her that a suit should be commenced on the part of the Government, to which she should give her support, for the purpose of setting up and carrying out the provisions of the will. The Collector indeed threatened proceedings but with a somewhat different object, and the suggestion of the friendly suit was made on the opinion of Counsel (Mr. Lowe). The Collector accepted the suggestion by his letter of the 25th October 1875, and the plaint was filed on the 19th May 1876.

The Secretary of State, as already mentioned, is the plaintiff, and the defendants are three, viz., (1) Komoleh Kaminee, the widow; (2) Moni Loll Banerjee, sued as guardian of the minor Hori Dasi (instead of Hori Dasi suing by her next friend); and (3) Ram Lall Mookerjee. Seetanath Banerjea and Rakhal Doss Chowdhry, persons named in the will as advisers of the widow, were afterwards added at the instance of Ram Lall.

It is as well to mention here—

I. That Government has a two-fold interest under the will:—(*a*) protection of the large legacy for charitable purposes; and (*b*) the reversion mentioned in the 20th clause.

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II. That Ram Lall has very good reason for contesting the will, inasmuch as it (like the first revoked instrument) omits all mention of him, and undoubtedly had for its principal object the depriving him of the succession.

All the defendants, except Ram Lall, supported the will, and the widow submitted that she had carried out its directions to the best of her ability.

Ram Lall again "disputed and denied" the alleged will, and "put the plaintiff to strict proof thereof." He also submitted that clauses 6 to 12, and clause 20, as well as clauses 13 to 19, were all invalid and inoperative, and that no part of the will was effectual, except that which gave the estate to the widow for her life. He denied the right of the Secretary of State to sue and the existence of any cause of action, and finally insisted that the Advocate-General was a necessary party.

This suit, like the earlier proceedings, came on before Mr. PRINSEP, and he was of opinion that the making of the will was fully proved; that under its provisions, and subject to the payment of an immediate legacy of Rs. 1,50,000 for charitable purposes, the widow took a life-interest in the estate; that on her death Hori Dasi, if not disqualified, would succeed and take a life-interest, but that after the death of both ladies, or on the death of the widow, if Hori Dasi should be then disqualified, the estate would pass to the next legal heir of Ram Lall Mookerjee, a supposed provision in favour of male descendants of Hori Dasi being held ineffectual, and the reversion to Government coming after them being thus defeated. He also directed that the fund created by the legacy should be vested in the Collector as trustee, but declined to propound any scheme for the management, and he ordered that the costs of all the parties should come out of the estate.

This decision has satisfied nobody, and all the parties concerned have appealed—

Hori Dasi against the curtailment of her interest and on minor points;

Ram Lall against the bequest in favour of Hori Dasi being allowed any operation whatever;

The Secretary of State (plaintiff) against the ruling by which

Hori Dasi's estate was limited, and the gift over invalidated; and, finally, the widow, as respondent, files objections, urging that she has not been guilty of misconduct or laches, and ought not to have been deprived of the management of the trust, also that the costs of the proceedings ought to have been charged upon the opponent, Ram Lall, and not on the estate.

All these parties have been heard by Counsel before us. Mr. Woodroffe appeared for Hori Dasi; Mr. Advocate-General for the Secretary of State; Mr. J. D. Bell (Standing Counsel) for the widow; Mr. Montriou and Mr. Evans for Ram Lall. We treated the case as being substantially one in which Ram Lall, having opposed the will and succeeded in invalidating its most important provisions, was respondent, the other parties being appellants as interested in maintaining the will in its integrity. We, consequently, heard each Counsel once and allowed Mr. Woodroffe to reply on the appeal generally. Mr. Advocate-General was also permitted to answer the argument of Mr. Bell. Afterwards Mr. Montriou contended that Mr. Woodroffe had shifted the argument, and that he was therefore entitled to a further reply, but this we saw no reason to allow, as two Counsel had already addressed us on behalf of Ram Lall. Mr. Evans indeed, still later, when the hearing was over, sought to put the same request on a different ground, viz., that Ram Lall had a distinct appeal of his own. But that appeal, as may be seen, does not relate to any separate part of the case, it merely contends for a particular view of the law applicable to it, and clearly on the same principle every one of the parties might have claimed to be separately heard as against Mr. Montriou. And in fact if Ram Lall's case had been heard as a separate appeal, we were so entirely against Mr. Montriou that we should not have called on the respondent.

Before disposing *seriatim* of the several appeals, it may be convenient to state our opinion of what the testator intended by his will to effect.

When Behari Lall made the will in question, he was a man scarcely past the prime of life, quite capable of leaving further issue, but for the moment, having no living child, nor any living descendant except a daughter's daughter of very tender years.

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If he then died intestate, his estate would go to his widow, and on her death, his daughter's daughter would not take, but his brother Ram Lall, if then living, would be the heir. This he was determined to prevent by the exercise of the testamentary power.

In carrying out this purpose, he provided, firstly, for the possible case of issue being born to himself.

In that event he directed that such sons, son's sons, or son's grandsons surviving him should take according to Hindu law (Cls. 2 and 4).

On failure of them, he directed that his wife should take *according to Hindu law* and enjoy the profits for life (Cl. 5).

If daughters should be born, they, or on their death, their sons were to take, after the death of the widow, *according to the Hindu law* (Cl. 6).

Here, on failure of the heirs abovementioned, the brother, if he survived, would have come in, had the testator so willed, *according to the Hindu law*, the daughter's daughter being no heir but a stranger.

But at this point the testator interposes his will, and directs that the estate shall go specially to his daughter's daughter Hori Dasi, the disposition being literally in these terms: "Sreemutty Hori Dasi Dabi shall be owner of my property, and without dispute shall enjoy and possess the same to her sons and son's sons in succession" (Cl. 7):

If, however, at the death of the widow, Hori Dasi should be barren, or a widow with no living son (*anira*), or otherwise disqualified, (referring evidently to the circumstances in which a daughter would not take by the Hindu law) she was not to become the owner, but was to receive Rs. 300 per mensem for her life (Cl. 9).

In the event of the failure of heirs previously mentioned, and of the disqualification of Hori Dasi, the whole of the property was to pass to the Government for charitable purposes (Cl. 20).

The District Judge, upon the 7th clause above referred to, says that he finds "no difficulty in giving effect to the succession of Hori Dasi under the will" (page 31), and a little lower down he

says:—"It seems, however, to have been the intention of the testator that Hori Dasi should have only a life-interest in his estate, for he sets forth in his will that she shall at her death transmit the estate to her descendants, *puttro poutradi* being the expression used. This term, in my opinion, refers to male descendants, and in thus attempting to regulate the succession, it appears to me that the will is bad and opposed to the rule laid down in the Tagore case. This provision is, therefore, of no effect and void."

Having so decided as to that point, he proceeds to consider the effect of clause 20, and having set out the terms of it, he says:—"That is to say, that in the event of failure of any male heir to whom Hori is to transmit the estate at her death, the Government is to become the trustee for certain charitable purposes. Inasmuch, however, as it has been held that he will, so far as it goes beyond the gift of the life-interest to Hori Dasi, is bad; this further provision is also null and void."

Now, in the first place, the Government was not to take only or at all, in the event of failure of any male heir of Hori, but in certain circumstances, was to take *instead of her*. There is no direction whatever that the Government should take on failure of Hori Dasi's line, but only that the estate should go to Government in the event of her being disqualified. The words of the original literally mean, as we understand them:—"If no son or daughter be born to me, *and* if my daughter's daughter's (*i. e.* Hori Dasi's) decease occurs before she brings forth a son, or she be (*when the succession falls in*) barren (*avira*) or otherwise disqualified, then my whole estate shall go to Government." The words in parenthesis are not in the original, but we consider them to be meant, because this view harmonizes with the 9th clause the word "become," which the translation in the paper book contains is not used, and we see no reason to suppose that Behari Lall, who in general desired to follow the law, would have departed from the established rule as to daughter, that an inheritance once vested would not be afterwards divested by reason of her *becoming "avira"* or otherwise.

The only case not clearly provided for in the will seems to be this: If Hori Dasi had a son who survived her, but herself died

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before the widow, was it intended that the Government should take, or was that son to take? On the one hand neither of the further events contemplated in the 20th clause would have arisen, *i.e.*, Hori Dasi would not have died without giving birth to a son, nor would she be disqualified at the death of the widow, unless we say that death itself is included in disqualification, nor, on the other hand, could Hori Dasi's son easily succeed, being a stranger and not provided for in the will.

But we need not occupy ourselves with a case not before us.

We have stated our impression as to what Behari Lall intended, and we proceed to consider whether effect can be given to his intentions, and whether the Court below has decided correctly.

We dissent entirely from the learned Judge when he holds that the words *puttro poutradi krame* denote an attempt to limit the succession to Hori Dasi's male descendants in any manner opposed to the decision in the Tagore Will Case (*Tagore* vs. *Tagore*, 9 B. L. R., 377). The devise and bequest to her are contained in the words *audhikarini hoibek*," and the words added are merely usual words, implying an absolute and heritable estate.

If these words are to be interpreted in the sense applied to them by the Judge, very few grants in the Bengali language could stand, because the formula is one constantly used to show that the estate is to go beyond the life, and in this particular case, the significance of it is apparent on comparison between the devise to Hori Dasi and that to the wife. Of the latter it is said :—

'She shall become owner according to the Shastras, and shall enjoy the profits for her life.'

Of Hori Dasi :—

'She shall become the owner and shall enjoy it to her latest posterity, *i.e.*, for ever.'

Puttro and *Putro*, no doubt, mean son and son's son, but these two persons are always the first in the category of heirs, and therefore *puttro poutradi* may well be taken to mean heirs generally. Indeed the Judge's construction was not supported in this Court by Mr. Montriou.

The facts of the Tagore case well summarized by Mr. Mayne in his exceedingly valuable work, "Hindu Law and Usage," were

as different from those of the present case as it is possible to conceive. In that case the testator contemplated not merely the disinheriting of his son, but the creation of a highly complex and artificial system of succession, embracing a number of persons not in being, and who very probably might never exist. In fact he sought to create a "kind of state tail" wholly unknown and repugnant to Hindu law.

In the case before us the testator, after giving the widows (or life) estate to his wife, gave the reversion to another person then in being, though not in the line of succession. Thus far it is clear he could go. The Judicial Committee in *Sreemutty Soorjo Monee Dasi* vs. *Denobundhoo Mullick*, 9 Moore I. A., 135, say:—"Whatever may have formerly been considered the state of that law as to the testamentary power of Hindus over their property, that power has now long been recognized and must be considered as completely established. This being so, we are to say whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindu law in allowing a testator to give property, whether by way of remainder or by way of executory bequest (to borrow terms from the law of England) upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not; that there would be great general inconvenience and public mischief in denying such a power; and that it is their duty to advise Her Majesty that such a power does exist." Mr. Montriou, however, contends that this bequest is bad, not by reason of the alleged limitation to male heirs, but because it is imperfect and invalid as a gift, and is not in truth a gift at all, but an ineffectual attempt to alter the rule of succession and convert a stranger into an heir.

There was some discussion at the Bar as to whether this was a gift subject to be divested, or a gift burthened with conditions. We have already intimated our opinion that it was not Behari Lall's intention that the estate once vesting should afterwards be divested. Is the gift then subject to conditions; or, in other words, subject to the donee having fulfilled, or being in a condition to fulfil certain qualifications repugnant to Hindu law? We think not.

Mr. Montriou, with the assent of opposing Counsel, put in, as

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part of his argument, a printed paper said to be the composition of a native gentleman learned in the Shastras.

I confess that it seems to me to be among the advantages for which the people of this country have in these days to be thankful, that their legal controversies, the determination of their rights and their status have passed into the domain of lawyers instead of Pundits and Casuists, and in my opinion the case before us may very well be decided on the authority of cases, without following Sreenath, Achyatanund and others through the mazes of their speculations on the origin and theory of gift.

But viewed merely as a case of gift interpreted by such light as those commentators afford, it seems to me that Hori Dasi's position may be perfectly well supported.

The owner Behari Lall having to dispose of the ownership of this property for all time, bestowed it in two parts, on his widow for her own life, and on Hori Dasi thereafter, provided that she answered certain stipulations, and if not on the Government. Now it might be uncertain, during the continuance of the widow's life-estate, whether Hori Dasi would answer the conditions or no, but the uncertainty would be unimportant, because the ownership would be for the time in the widow. At her death, the ownership would have to vest in some one, but at that moment there need be no uncertainty whether Hori Dasi was within the prescribed conditions; if she was, she would take; if not, then the other person indicated, namely, the King, of whom there is never a failure, would take. But moreover the conditions themselves, far from being repugnant to Hindu law, are in entire accord with it, being in fact those which that law itself expressly imposes on a daughter, and which are not laid down as to the daughter's daughter only because the law does not make her an heir. But now that the power of disposing of property by will, founded on established custom, recognized first by judicial authority, and since my Legislation enables a Hindu to bequeath his property to a person whom the Shastras would not have made his heir, surely the bequest cannot be the worse, because the testator in elevating the taker to the position which her mother would have occupied if she had lived, imposes the same qualifications as the Shastras would have imposed on the mother.

This view of the matter coincides with the rule as laid down in Mr. Mayne's work already referred to, page 340 (section 350), and seems to us reasonable and right. The conditions imposed are neither in violation of the fundamental principles of the Hindu law nor inconsistent with the nature of the estate given.

We see no indication of a desire to introduce a new principle or rule of succession, but on the contrary, the testator's desire being to benefit a particular person, depriving another, he sought to assimilate the position of the person preferred as closely as possible to that of the person through whom, if she had survived, the desired object would have been effected.

We think, therefore, that Behari Lall's intention was to confer on Hori Dasi, if she lived and was qualified, an absolute estate, and that this object has been effectuated; and we also think that the gift over to the Government in case of Hori Dasi not surviving or being disqualified is perfectly good and valid.

We have next to consider the Judge's order touching the trust fund, and we find that the District Judge, without assigning any reason for it, has directed the Collector to be trustee for the carrying out of the charitable purposes specified in the 13th and following clauses of the will. On the other hand he has refused to frame any scheme for the administration of the trust. This is simply to deprive the persons who may be supposed to have a personal interest in carrying out the wishes of the testator, without any misconduct imputed to them, and to place the trust in the hands of a public servant, who can have little leisure to attend to it, without the protection of any rules framed for his guidance. We can see nothing in the conduct of the widow which proves her to be undeserving of confidence, and with reference to any supposed general want of capacity for such business on the part of females, we observe that provision has been made by the husband, who has associated with her two persons whom he considered capable.

We think this part of the Judge's order should be set aside; that a scheme should be framed for the administration of the trust; that the management should be entrusted to the widow, assisted by the persons named, and with a power of inspection reserved to the Collector.

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It was contended by Mr. Montriou that making a declaration as to the rights of parties in such a case as the present was in the discretion of the Court, and that we should not make such declaration where the obvious intention of the testator was to prevent the rules of succession. We see, however, nothing in the will beyond a simple and valid exercise of testamentary power, and we think the case a proper one for a declaratory decree.

Finally, as to costs of Ram Lall, which, together with all the other costs, the Court below has ordered to be paid out of the estate.

The attitude of Ram Lall has been hostile throughout. He has not merely impugned the validity, but even affirmed the spuriousness of the will, and this, on two distinct occasions, in the Court below.

It is said on his behalf that he was entitled to have the will, which disinherited him, proved "in solemn form," and that it was right his costs should come out of the estate.

Now, although the objector could not in any view of the case have been entitled to inherit immediately, although the widow's life was probably at least as good as his, and he might, therefore, have never been entitled at all, yet, as he and his brother were not on good terms, and he might have no knowledge of the facts, he would be quite justified in having evidence gone into as to the *factum* of the will. But this was actually done in the certificate proceedings. The will was keenly contested there, and the Judge decided in favour of its authenticity. The evidence showed the will to have been deposited in the Burdwan Registry Office by Behari Lall in person. It is impossible to believe that after this Ram Lall can have doubted in good faith whether the will was his brother's. Assuming then that he knew it was really his brother's will, he chose to come into Court and attempt to upset the will, on the ground of its being inofficious and contrary to Hindu law. In doing this, he took his chance like an ordinary litigant, and we cannot see that he can expect any other fortune.

Oddly enough in the certificate case the petitioner (widow) recovered costs from him, the pleader's fee being fixed at Rs. 80. In these proceedings, where, so far as these two properties are concerned, precisely the same question is raised and his position

very little improved. He is allowed his costs including a Vakeel's fee of Rs. 2,800.

We think that he should be left to pay his own cost of opposition; but that the costs of other parties should, as ordered by the Court below, come out of the estate.

The Advocate-General has applied for the costs of employing Counsel (Mr. Ingram) to watch the case in the Hooghly Court, on the ground, as we understand, that Ram Lall having insisted that the Advocate-General should be a party, as the Attorney-General would be in England, it was necessary to employ some person who could argue that part of the case. We think there is some force in this. The contention on the part of Ram Lall seems to us to have been an extraordinary one, for we may confidently say that the appearance of the Advocate-General, as a party, has been unknown in the Mofussil Courts. The application was one with which a Mofussil pleader could hardly have been qualified to deal, and we think that a fee not exceeding Rs. 1,000 might have been allowed for instructing and retaining Mr. Ingram.

We shall, therefore, vary the decree of the Court below by making a declaration as to the rights of parties in conformity with what has been said. We shall set aside the appointment of the Collector as trustee, and we shall refer it to the District Court to frame a proper scheme for the administration of the trusts by the widow for life, but subject, of course, to removal in case of misconduct or negligence, and subject to inspection by the Collector. We shall also reverse so much of the decree as enables Ram Lall to recover his costs out of the estate.

We are unable to understand why precisely equal costs are allowed to the widow and Moni Loll (guardian of the minor) on whom the brunt of the suit fell, and to Rakhal Doss and Seetanath who were added as parties, who had no interest in the matter, and who took care to tell the Court so. But there is no appeal before us on this point.

McDONELL, *J.* :— McDONELL, *J.*

The respondent Ram Lall will pay one set of costs of this appeal, to be apportioned between the Secretary of State, the widow, and Hori Dasi, who will be entitled to their other reasonable costs out of the estate.

[CIVIL APPELLATE JURISDICTION.]

1879 *Feby.* 17*th.*

SRIMOTI SHOSHEMUKHI DABIA . . . . APPELLANT,

AND

Nos. 266, 267 and 268 of 1877.

NOBIN CHUNDER ROY AND OTHERS . . . RESPONDENT;

Award, Filing of—Arbitration—Act VIII of 1859, *section* 327.

Where an arbitration bond provides that the matters in dispute referred to the arbitrators may be taken up and dealt with *seriatim* and the award delivered bit by bit *(khund-khund)*, it is not necessary under section 327 of Act VIII of 1859, that all the matters referred should have been decided before the first portion of the award dealing with some only of the subjects in dispute can be filed.

REGULAR APPEALS from a decision passed by the Judge of Dacca.

The facts are these:—One Tara Pershad Roy died leaving three sons him surviving. By a will, dated 28th Kartic 1274, he gave to his three surviving sons each a four-anna share, and to the adopted son of the widow of a deceased son Purno Chunder Roy, the remaining four annas of his estate. Another will, however, was put forward, dated 11th Choitro 1280, and executed during an attack of cholera just before the testator's death, modifying the terms of the former will in favour of the adopted son of the widow of Purno Chunder.

This latter will was disputed by the sons of the testator, and application was made by two of them (the third being a lunatic) for probate of the other will of 28th Kartic. The widow at the same time applied for probate of the later will.

Pending the hearing of these applications, which were agreed to be taken together, an arrangement was come to by which certain persons were appointed arbitrators to decide as to the validity of the two wills, and to decide all disputes arising thereunder. By the arbitration bond power was given to the arbitrators to deal, if they chose, with the subjects in dispute *seriatim*, and to deliver their award in the same way *(khund-khund)*.

The arbitrators accordingly, taking first into consideration the

matters which appeared of most importance, namely the question as to the validity of the wills, the maintenance of the testator's daughters, and certain disputes as to the house arrangements, gave their award upon these points without deciding upon certain other matters referred to them for their decision.

The sons then applied to have this award, which found against the later will and in favour of the other, filed, but it was objected that the Court had no power to file it, as all the matters submitted to arbitration had not been decided. The Judge granted the application, giving probate of the will of 28th Kartic 1274.

Against the order of the Judge, the widow of Purno Chunder appealed.

Baboo *Ghunder Madhub Ghose*, and Baboo *Kamini Kumar Guha*, for Appellant.

Baboo *Durga Mohun Dass*, for the Respondents.

The judgment of the High Court (1) was as follows :—

These three appeals really turned upon one question. It appears that the District Court had before it two cases of applications for probates of wills, and the parties interested in those cases determined, while the proceedings were going on, to refer those disputes, and also other matters, to the decision of arbitrators, and the arbitrators were authorized fully in making their award to take up the matters in question খণ্ড খণ্ড, that is to say, portion by portion. Thereupon they made their award in regard to the matter which was most pressing, that is to say, in regard to the will, and the respondent before us filed such award in the Court of the District Judge under section 327 of Act VIII of 1859.

Before the Judge two objections were made; *firstly*, that the arbitrators had acted with partiality; and, *secondly*, that they had not decided all the matters referred to arbitration. The Judge states that no evidence as to the first matter imputed was offered to him; and as to the second, it was covered by distinct stipulation between the parties. Accordingly he filed the award, and in accordance with its terms disposed of the applications in the two cases.

(1) JACKSON and MCDONELL, *J.J.*

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SRIMOTI SHOSHEMUKHI DABIA v. NOBIN CHUNDER ROY.

Judgment.

It is contended here in the first place that the Court of the Judge was not the proper Court to receive this award; that it ought to have been filed in the Court of the lowest jurisdiction; and the Court of the Subordinate Jude is suggested as the proper Court, on what ground I do not know. Section 327 says: "When any matter has been referred to arbitration without the intervention of any Court of Justice and an award has been made, any person interested in the award may, within six months from the date of the award, make application to the Court having jurisdiction in the matter to which the award relates, that the award be filed in Court."

Now the arbitrators having those various matters referred to them, naturally turned their attention first to the matters which were in Court, and in regard to which a decision was pressing. That was a matter exclusively within the jurisdiction of the District Judge's Court, and besides the matters were pending in that Court. It seems clear, therefore, that the Court of the District Judge was the proper Court in which to file that award.

Then it is contended that this award should have been filed on a stamp of Rs. 10. We asked the pleader for the appellant to state what the provision of the law was. He was unable to show any. On the contrary, the proper stamp appears to be that provided for petitions before the Court in which the award was filed. It also appears that the arbitrators had the question of stamp before them.

Thirdly, the objection is again raised that the arbitrators did not decide all the points in dispute. The parties, it seems to me, were at liberty, if they chose, to allow the arbitrators to take up *seriatim* the matters in dispute, and, so to say, to deliver series of awards.

I think, therefore, the Judge was right in allowing the award to be filed, and that these appeals must be dismissed, no appeal lying in such cases.

[CIVIL REFERENCE.]

OFATOOLAH SURDAR . . . . . PLAINTIFF; 1879 March 24th.

AND

DWARKANATH MOITRO AND OTHERS . . . DEFENDANTS.

Growing Crops—Execution sale under Act VIII (B.C.) of 1869.

Unless growing crops are excepted by the notification of sale, or there is any custom proved to the contrary, the purchaser at an auction sale, under Act VIII (B. C.) of 1869, is entitled to the crops growing on the lands purchased by him.

REFERENCE under section 617 of Act X of 1877, from the Officiating Judge of Small Causes at Kooshtea.

The circumstances out of which the reference arose are these : The plaintiff was tenant of the first defendant, but not having paid his rent, a suit was brought against him, and a decree obtained by his landlord.

In execution of this decree, the tenure was sold under section 66 of Act VIII (B. C.) of 1869, and purchased by the first defendant. It was admitted that the plaintiff had raised some paddy on the lands comprised in his tenure, and that at the time of the execution sale the crop was standing on the land unharvested. No mention, it appears, of the crop was made in the notification or certificate of sale. The auction-purchaser cut and carried off the crop.

The plaintiff then brought the present action for the recovery of damages, and the gist of his contention was, that the crop, not having been specifically sold, the defendant had no right to appropriate it. The defence was, that the crop passed with the lands, and that the defendants' right to appropriate it followed as a matter of necessary inference. It does not appear that any evidence was given as to any special custom.

The Judge was of opinion that standing crops were immoveable property, and passed under an unreserved sale of the tenure to the auction-purchaser, and dismissed the plaintiffs' suit with

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OPATOOLAH SURDAR v. DWARKANATH MOITRO.

costs, subject to the opinion of the High Court upon the question whether the unreserved sale of an under tenure, under section 66 of Act VIII (B.C.) of 1869, vests in the auction-purchaser a right to the crop standing thereon.

Judgment.

The judgment of the High Court (1) was as follows:—

It is not stated that evidence was given of any special custom on this point.

The sale of the tenure would apparently pass all that was growing upon the land, unless the growing crops were excepted by the notification of sale, or else a custom were proved that the outgoing ryot should have the crops, subject to a payment for all and occupation of the land while they remained on the ground. If such a custom with tender of the proper amount were proved, the plaintiff might be entitled to recover, but otherwise he would not appear to have laid the foundation for a claim for damages, as the defendant merely cut down crops growing on his own land.

(1) JACKSON and MCDONELL, *J.J.*

[CIVIL APPELLATE JURISDICTION.]

1879
March 24th.

Nos. 27 and 278 of 1878.

RAM LAPIT RAM AND OTHERS, JUDGMENT-DEBTORS . . . . . } APPELLANTS;

AND

CHOOARAM AND ANOTHER, DECREE-HOLDERS. RESPONDENTS.

CHOOARAM AND ANOTHER, DECREE-HOLDERS. APPELLANTS;

AND

RAM LAPIT RAM AND OTHERS, JUDGMENT-DEBTORS . . . . . } RESPONDENTS.

Execution of Decree—Decree for partition of property, partly ascertained and partly unascertained—Declaratory decree—Act X of 1877, *sections* 211 *and* 212—*Act VIII of* 1859, *sections* 196 *and* 197.

In the course of a suit for declaration of right to property, and for partition, a compromise was entered into by which it was agreed that certain property already ascertained should be divided in certain proportions, and that certain other property, not yet ascertained should, on being ascertained, be partitioned on the same basis. The Court merely recorded the compromise, and declared that the decree should be according to terms therein set out.

Held, that this decree could only be executed as to the property which had been ascertained as divisible, and that as to the other property the decree must be taken as declaratory only.

The Court executing a decree is bound by the terms of the decree, and it is only in cases provided for by sections 211 and 212 of Act X of 1877, corresponding with sections 196 and 197 of Act VIII of 1859, that it is at liberty to determine the rights of the litigants in proceedings taken after decree.

APPEALS from orders passed by the Subordinate Judge of Sarun.

Baboo *Sreenath Banerjee*, for Appellants in first appeal, and Respondents in the second.

Baboo *Mohesh Chunder Chowdhry*, and Baboo *Doorga Dass Dutt*, for Respondents in first appeal.

Moonshee *Mahomed Yusoof*, and Baboo *Pran Nath Pundit*, for the Appellants in the first appeal.

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RAM LAPIT RAM v. CHOOARAM.

Judgment.

AINSLIE, *J.*

The facts sufficiently appear from the following judgment of the High Court (1), which was delivered by

AINSLIE, *J.*:—

The parties to these two appeals were members of a joint family, holding certain property in joint possession.

The plaintiff sued for declaration of right to the property, and for partition.

In the course of that suit the parties entered into a compromise separating their respective rights and liabilities. By that compromise a six annas nine pie share of the properties generally was assigned to the plaintiff, and an eight annas three pie share to the defendants, the remaining one anna being set aside for specific purposes. Their rights in the ancestral shops, gardens, homesteads and other immoveable properties were declared in these proportions. In respect of the moveable property, there was a certain list which had been made by the Nazir of the Court: but in addition to it the solenamah alludes to properties which were or might be in possession of the parties, and which were to be honestly produced and divided on the same terms as the other properties. And, further, with respect to the shops and money transactions, there was an account to be taken, and the final payment by one to the other was to depend upon the taking of that account.

It is quite clear that before making any decree under the solenamah, it was the duty of the Court to ascertain those matters which had been left unascertained by the solenamah, and then having ascertained them to apply the principle of division which had been agreed upon. But instead of doing this, the Court unfortunately left matters *in statu quo*, and simply recorded the solenamah in the decree, and declared that the decree was to be in the terms of the solenamah. When this decree was put into execution, disputes, as might naturally be expected, arose, and we do not see how we can, in executing that decree, dispose of those disputes. The Court executing the decree is bound by the terms of the decree, and it is only in cases provided for in sections 211 and 212 of the Procedure Code of 1877, corresponding

(1) AINSLIE and BROUGHTON, *JJ.*

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RAM LAPIT RAM v. CHOOARAM.

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to sections 196 and 197 of the Code of 1859, that it is at liberty to determine the extent of the rights of the litigants in proceedings taken after decree.

It appears to us, therefore, that this decree must be taken as made up of two parts, namely, an order capable of execution in respect of all that had been ascertained to be capable of division, and an order declaratory of rights in respect of that which remained unascertained. So far as the decree is declaratory, it cannot be put into execution. Whether the parties can get their remedy by moving in the original suit to have a proper decree made, or by a fresh suit on the solenamah, is a matter which we are not at present called on to discuss. All that we can say is, that the Court, in executing the decree which was made, must restrict itself to dealing with those properties and sums of money which had been ascertained at the time when the decree was made.

Both appeals, 277 and 278, must be dismissed. But we think that, inasmuch as it was the duty of the vakeels to see that a decree capable of execution was drawn up, neither party ought to be allowed any costs incurred subsequent to the making of the decree.

[CIVIL APPELLATE JURISDICTION.]

1879 *Feb.* 21*st.*

Nos. 2787 of 1877.

RAM KISHORE LALL . . . . . APPELLANT;

AND

NUND RAM . . . . . RESPONDENT.

Parol Evidence, Admission of—Kabuliat—Evidence Act, I of 1872, *section* 92, *provisos* 2 *and* 3.

Plaintiff having sued for arrears of rent payable under a kabuliat in respect of a share of four villages, the defendant pleaded that he had been put in possession of one only of the four leased to him, and that therefore he was not liable to the whole claim. Parol evidence was admitted to show that at the time the kabuliat was granted it had been agreed between the plaintiff and defendant, the title of the former being under dispute, that the whole rent payable under the kabuliat should be payable in respect of such of the villages as should actually come into defendant's possession.

Held, that such parol evidence was rightly admitted, there being no stipulation in the lease that the defendant should only pay rent on being put completely into possession, and that although payment of rent is not ordinarily enforced unless the lessor puts the lessee into possession, it was quite competent to the parties to waive such privilege.

APPEAL from a decision passed by the Judge of Tirhoot, affirming a decree of the Sudder Moonsiff of that district.

This was a suit to recover arrears of rent in respect of a share of a certain mouzah on the basis of a kabuliat, dated 29th April 1871. The defendant pleaded that he was not liable for the whole sum claimed, on the ground that during the time for which rent was claimed he was in possession of a share in one only, out of four mouzahs covered by the lease granted him by the plaintiff; and that it had been by reason of the plaintiff's defect of title that he had not been put in possession of all four mouzahs. The Moonsiff admitted and recorded parol evidence to show what were the circumstances under which the lease was granted to the defendant, and upon this evidence and the statements of the parties themselves, came to the conclusion that, although the defendant had obtained possession of but one

village out of the four leased to him under the kabuliat, it was clear that he had taken the lease in question on the understanding (the plaintiff's title being at that time in dispute), that should he not get possession of one or more of the villages, he would be liable to pay, for such of the villages as should actually come into his possession, the full amount of ticca rent agreed upon, and that, therefore, the defendant was liable for the full amount. Further, from the defendant's own deposition, it was proved that he had paid the full amount of annual rental to plaintiff for the year previous to the first year for which arrears were claimed.

Accordingly a decree was given by the Moonsiff for the whole claim. On appeal, the District Judge was of opinion that parol evidence had been rightly admitted under provisos 2 and 3 of section 92 of the Indian Evidence Act, and on the merits upheld the decision of the Court of First Instance.

The defendant then preferred this further appeal to the High Court.

Baboo *Hem Chunder Banerjee*, and Baboo *Omakali Mookerjee*, for the Appellant.

Baboo *Gopal Lall Mitter*, for the Respondent.

The judgment of the High Court (1) was as follows :—

We think the judgment of the Courts below is right as to the admission of parol evidence on the point in question. There is no express stipulation in the lease that the defendant should only pay rent on his being put completely in possession. No doubt, as a general rule, the Court does not ordinarily enforce payment of rent unless the lessor puts the lessee in possession, but it is quite competent to parties to waive any such privilege; and as there was no express condition in the lease, we think it was open to the plaintiff to give evidence of the parol agreement on that point. That such an agreement should have been made seems not improbable, regard being had to the circumstances of the case. The special appeal is dismissed with costs.

JACKSON and MCDONELL, *J.J.*

[SMALL CAUSE COURT REFERENCE.]

1879
Feby. 24th.

THE ADMINISTRATOR GENERAL OF BENGAL. . . . . } PLAINTIFF;

AND

KEDAR NAUTH MOITRY AND ANOTHER . . DEFENDANTS.

Limitation—Promissory Note—Payable on demand—Act IX of 1871, *Schedule II, Art.* 72—*Act XV of* 1877, *section* 2 *and Schedule II, Art.* 73.

Section 2 of Act XV of 1877 allows a plaintiff two years from the 1st October 1877, to bring his suit in cases where the period of limitation prescribed by that Act, is longer than the period prescribed by Act IX of 1871, but that allowance is not to be made where the period prescribed by the latter Act would expire before the completion of two years from the 1st of October 1877.

Omirtolall Dey vs. *Howell*, 2 C. L. R., 426, cited and distinguished.

REFERENCE to the High Court under section 8 of Act XXVI of 1864 from the Calcutta Court of Small Causes.

The case was stated as follows:—

This suit was instituted on the 21st October 1878, and was heard in the first instance on the 28th October 1878, and judgment was given for the defendants on that day.

An application for a new trial was subsequently made, and being of opinion that there was some doubt as to the question of limitation raised, we granted the application. At the re-hearing more evidence was adduced than was adduced on the first occasion. The plaintiff, the Administrator-General of Bengal, sues as the administrator of the estate of one Butto Kristo Doss, a money-lender, who died on the 17th September 1877. The suit is brought on a promissory note which is as follows:—

Rs. 575-6-3.

CALCUTTA, 23*rd December* 1874.

"On demand we jointly and severally promise to pay to Baboo Butto Kristo Doss, or order, the sum of rupees five hundred and seventy-five, annas six and pies three, only, with interest at the rate of twenty-one per cent. per annum for value received on account of the renewal of the former note, dated 14th July 1870.

(Sd.) Kedar Nauth Moitry.
(Sd.) Kameeka Nauth Moitry.

Interest to run on the above sum until realization.

(Sd.) K. N. M.
(Sd.) K. N. M.

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The plaintiff brings his suit for Rs. 1,000, abandoning an excess of Rs. 41-3-3 The defendants, who admit the making of the note, plead limitation only.

The books, both of the deceased Butto Kristo Doss and of the defendant Kameeka Nauth Moitry, have been produced. The former book is, though a business book, one kept very irregularly, and is all in the hand-writing of the deceased himself. The latter book is a private one, and is written up either by the defendant Kameeka Nauth Moitry or his son. From these books and from the other evidence we derive the following facts:—The first demand was made on the 12th February 1875, when a payment of Rs. 30 was made. In Butto Kristo's book this appears as a payment of principal, but in Kameeka Nauth's as a payment on account. On the 26th July 1875, another payment of Rs. 30 was made, which appears in Kameeka Nauth's book only in his son's hand-writing thus:—"Paid Butto Kristo Doss on account Rs. 30."

On the 6th August 1877, Nitololl Doss, who is a son of the deceased Butto Kristo, went to Kameeka Nauth and asked him to make a payment, and Kameeka Nauth then paid Rs. 20, which is entered in Butto Kristo's book thus:—"6th August 1877, Kameeka Nauth Moitry, Rs. 20."

There is no evidence to show whether the two last payments were made either on account of principal or interest, though there can be no doubt that the creditor is entitled to appropriate them in any manner he pleases.

The last payment is relied on as an acknowledgment, in order, in any case, to bring the suit within three years; but we do not think that each payment necessarily amounts to an acknowledgment, whether section 21 of the Limitation Act of 1871, or section 20 of the Limitation Act of 1877, be applicable: under either the payment can only amount to an acknowledgment, when it is a payment of interest as such, or when it is a payment of principal, and entered somewhere in the hand-writing of the person making the same. Here the payment was not made with the intention of applying it as interest; it was a mere general payment without any statement being made as to its application, while it appears only in the hand-writing of the creditor in the creditor's book. This payment cannot, therefore, give the plaintiff any fresh starting point for bringing his suit.

But a more important question has been raised as to whether this suit is otherwise barred or not. The promissory note is dated the 23rd December 1874, and the suit was instituted on the 21st October 1878; so that, if three years is the period of limitation to be applied, whether it commence from the first demand of the 12th February 1875, or from the payment of the 26th July 1875, the suit will be barred. It is, however, argued by the plaintiff's counsel on the authority of the case of *Omirtolall Dey* vs. *Howell*, decided by the High Court on the 17th June 1878, on a reference from this Court, that the plaintiff has two years from the 1st October 1877, according to section 2 of the Limitation Act, 1877.

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Before coming to any conclusion on this point, it is necessary clearly to understand the facts of that case. The promissory note, which was on demand, had been made on the 28th January 1874. The first demand was made some time during the year 1876 [the exact date not being specified], and the suit was instituted on the 4th March 1878. No payment had been made. If then a period of limitation of three years began to run from the date of the note as provided by article 73 of the Limitation Act, 1877, the suit was barred: but if a period of limitation of three years began to run from the date of the demand, as provided by article 72 of the Limitation Act, 1871, the suit was not barred; because three years had not elapsed since the 1st January 1876, the very earliest date on which the demand could have been made; while it might have been that the demand was made as late as the 31st December 1876. We do not think, therefore, that the learned Judge, who decided that case, intended to say that in all such cases the plaintiff has two years from the 1st October 1877, whether his suit would be barred under the Limitation Act, 1871, before the expiration of that period or not; because the latter portion of section 2 of the Limitation Act, 1877, is very clear, and says that the plaintiff shall have two years from the 1st October 1877, "unless where the period prescribed for such suit by the same Act shall have expired before the completion of the said two years." We think that the true construction of that section is, that a suit is barred if under the Limitation Act, 1871, it would have been so barred before the completion of two years from the 1st October 1877; *i.e.*, before the 1st October 1879; but if it would not be barred under the Limitation Act, 1871, before the completion of that period, the plaintiff has the whole of the two years, commencing from the 1st October 1877, within which to bring his suit. If in all such cases the plaintiff still has two years from the 1st October 1877, there may be instances in which a plaintiff may have nearly five years in consequence of section 2 of the Limitation Act, 1877, instead of three years from the date of the demand, the period allotted to him by the Limitation Act, 1871. If a promissory note is dated in March 1874, and the first demand is made on it on the 3rd October 1874, the creditor will have, up to the 1st October 1879, or a period of nearly five years from the date of demand, if the contention urged by the plaintiff's counsel is correct, so in the case now before us, we find that the very latest date from which limitation can begin to run is the 26th July 1875; if then the plaintiff is entitled to two years from the 1st October 1877, within which to bring his suit, his period of limitation is extended from the three years given him by the Limitation Act, 1871, to something over four years and two months. We do not think that the decision referred to meant to lay down any such construction, nor indeed does it do so; but whichever way we view the decision is immaterial, for we have been asked by both sides to refer this particular point to the High Court, and thus we accordingly do, with the remark that it is unnecessary for us to decide whether the limitation begins to run from the 12th February or the 26th

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July 1875. For being of opinion that the plaintiff is entitled to three years only from one or other of these dates, his suit would in either case be barred. If he has two years from the 1st October 1877, his suit is not barred. The question referred is:—

Whether the plaintiff is entitled only to the three years period from the 12th February or 26th July 1875, (as the case may be), or whether he is entitled to bring his suit within two years, commencing from the 1st October 1877?

Contingent on the opinion of the High Court, our judgment will be for the defendants.

Trevelyan, for the Plaintiff.

The difficulty in this case arises from the new Act of Limitation, Act XV of 1877. The question to be decided is, whether section 2 of that Act gives the plaintiff an extended period of limitation.

At the time the Act came into force, the plaintiff's claim was not barred. In the case of *Omirtolall Dey* vs. *Howell*, 2 C. L. R., 426, GARTH, *C.J.*, and MARKBY, *J.*, held, that under the new Act the period of limitation applicable to promissory notes payable on demand was less than under the old Act. Consequently the plaintiff is entitled to a period of two years from the 1st October 1877, within which to bring his suit. The present case is merely an extension of that of *Omirtolall Dey* vs. *Howell*.

Allen, for the Defendants.

The following judgment of the Court (1) was delivered by

GARTH, *C.J.*:—

GARTH, *C.J.*

We are of opinion that the learned Judges who have referred this case to us are quite right in the construction which they have put upon the Act.

The 2nd section of Act XV of 1877 allows a plaintiff two years, from the 1st of October 1877, to bring his suit in cases where the period of limitation prescribed by that Act is longer than the period prescribed by the Act of 1871.

But then that allowance is not to be made in cases where the period prescribed by the Act of 1871 would expire before the completion of the two years; and the present appears to us to be

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one of those cases; because here the period which the plaintiff would have had for bringing his suit under the Act of 1871, expired before the completion of two years from the 1st of October 1877; and, therefore, according to our view of the Act, he is not entitled to the two years further time.

This point was not raised in the case of *Omirtolall Dey* vs. *Howell*, 2 Cal. Law Report, 426, nor could it have been properly raised there; because it did not appear in that case that the period of limitation, prescribed by the Act of 1871, would have expired before the completion of the two years; and consequently the case did not come within the exception in section 2.

The judgment of the Court below will be affirmed, and the defendants will have their costs of this Reference.

[CIVIL APPELLATE JURISDICTION.]

Feb. 28th.

No. 17 of 1878.

S. S. GLADSTONE AND OTHERS . . . . . APPELLANTS;

AND

SEWBUX AND ANOTHER . . . . . RESPONDENTS.

Damages, Measure of, for non-delivery of Goods under Contract of Sale—Forbearance of buyer at seller's request.

The defendants, by bought and sold notes, contracted in February 1877, to sell to the plaintiffs 200 tons of wheat, delivery under the contract to be given "during all April on 15 days' notice from the buyers. Notice was given on the 9th of April, but the defendants were unable to give delivery within the agreed time, and the plaintiffs, on the 11th May, instructed their attorneys to demand immediate payment of the difference between the contract price and the then market price treating the contract as rescinded. Subsequently the defendants being prepared to give delivery of 350 bags, the plaintiffs agreed to take delivery without "prejudice to their right of claim against the sellers on account of the remaining 175 tons still undelivered." This and several other parcels, making altogether 113 out of the 200 tons, were delivered during the latter part of May, but on the 31st of May the plaintiffs refused to take further deliveries, alleging that the quality of the wheat offered was inferior, and brought a suit for damages for the non-delivery under the contract of the remaining 87 tons.

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Held, that there was no binding agreement on the part of the plaintiffs to give time for the fulfilment of the contract after April, but merely a forbearance on their part to pursue their rights, and that the plaintiffs were entitled to the full measure of damages. *Ogle* vs. *Vane*, L. R., 2 Q. B., 275; and *Freith* vs. *Burr*, L. R., 9 C. P., 208, cited and followed.

APPEAL from a decision of Mr. Justice WHITE.

In this case there was a suit and a cross suit. The first suit was instituted by Sewbux and Bullub Doss, against Gladstone and others, the members of the firm of Gillanders, Arbuthnot and Co., on the 12th June 1877. In that suit the plaintiffs sought to recover the sum of Rs. 2,748-7, being the balance of the price of 3,085 maunds or 113 tons of Jamali wheat sold and delivered by the plaintiffs to the defendants at Calcutta, during the month of May 1877. In answer, the defendants admitted that the balance remained due, but claimed to deduct or set off Rs. 192-13 on account of the alleged low quality of the wheat delivered; Rs. 278-6 for excess refraction; Rs. 96 for sundry survey fees; and Rs. 496-13-3, the value of certain gunny bags belonging to the defendant, and alleged to have been appropriated by the plaintiffs.

In the cross suit Gillanders, Arbuthnot and Co., besides reasserting their claim to the deductions and set-off, claimed by their written statement in the first suit, sought to recover damages for breach of contract on the part of Sewbux and his partner to deliver 87 tons of Jamali wheat.

The contract out of which the two suits arose was entered into between the parties on the 10th of February 1877, and under it Sewbux and his partner contracted to sell to Messrs. Gillanders, Arbuthnot and Co., 200 tons of wheat. The time for delivery under the contract was "during all April on 15 days' notice from the buyers."

The sellers were unable to deliver within the agreed time, and in consequence of their failure so to deliver Messrs. Gillanders, Arbuthnot and Co., on the 11th of May instructed their attornies to demand immediate payment of Rs. 6,483-12, the difference between the contract price of 200 tons of Jamali wheat, and the then market price, and to give notice that if Sewbux and his part-

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ner should fail to comply with the request, immediate proceedings would be taken against them to recover the same.

After this letter the sellers proposed to give delivery of 350 bags of Jamali wheat. In answer to this proposal a letter was sent on the 19th May in the following terms:—"We will take delivery of 350 bags of Jamali wheat on the 21st instant. Please note, however, that our doing this will in no way prejudice our claim on you on account of the remaining 175 tons still undelivered." Between the 21st and 29th of May 113 tons or 1,234 bags were delivered and received in parcels varying from 60 to 200 bags.

On the 31st of May, Messrs. Gillanders, Arbuthnot and Co. received the following letter from the plaintiffs:—"Dear Sirs,—We have already delivered to you 1,234 bags of wheat, value Rs. 6,748-7, against which we have received Rs. 4,000 on account, we now beg to apply to you for the balance, as well as to request you to take delivery of the remaining bags against contract for 200 tons, paying cash for same on delivery. Should you fail to comply with the above request within 48 hours, we will consider the contract for the balance as cancelled, and will take the necessary steps to recover whatever will be due to us;" and on the same day replied by letter as follows:—"Dear Sirs,—We are in receipt of your letter of this date. Owing to the fact that you have been delivering to us Jamali wheat of a very inferior quality, we are compelled to retain in our hands for the present the balance nominally due to you according to your bills." On the same day the defendants in the cross suit wrote again to the plaintiffs a letter which contained the following passage: "We have the balance ready for delivery, we call upon you to pay the balance due to us, *and to pay for and take delivery of the remaining portion of wheat at once*, otherwise we shall refuse to give further deliveries." To this letter no reply was received. Upon this the first suit was instituted, and shortly thereafter the cross suit.

Phillips and *Bonnerjee*, for Plaintiffs, (Defendants in cross suit).

Jackson and *Stokoe*, for Defendants, (Plaintiffs in cross suit).

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After stating the facts the learned Judge (1), against whose decision the appeal in this case was instituted, proceeded with his judgment as follows :—

On the first day that this suit was heard, and after counsel for the plaintiffs in the cross suit had opened their case, the parties, through their respective counsel, admitted that the effect of these negotiations was to extend the time for the performance of the contract of the 10th February 1877 to the 31st May, then next following, and on that basis the issues were settled.

The counsel for the plaintiffs in the cross suit on the next day stated that he was wrong in admitting that the time was extended to the 31st of May as he claimed damages for the non-delivery of the 87 tons as of the 19th of April 1877. In no view of the case does it appear to me that damages would be recoverable as of the latter date, for the contract of the 10th of February gave the sellers all April within which to deliver. Whether the admission made by the counsel for the plaintiffs in the first suit ought to be allowed to be withdrawn or not, I am of opinion that, independently of that admission, the evidence shows that the parties treated the contract of the 10th of February as in force in the month of May, but varied in one particular only, viz., as to the time for delivery; and this was extended by the plaintiffs in the cross suit to during the month of May, or to within a reasonable time afterwards. I arrive at this conclusion upon the evidence of Mr. Gianno Kopulo, the acts and conduct of the parties, and the way in which the plaintiffs in the cross suit have shaped their case upon their pleadings. By the Indian Contract Act, 1872, section 62, the parties to a contract may agree to substitute a new contract for it or to alter it, and by the 63rd section a promisee may remit in part the performance of a promise made to him, or may extend the time for such promise, and the things that may be done under these sections may apparently be done as well after breach as before breach of the contract or promise. The sections themselves contain no limitation, and nearly all the illustrations under the sections relate to cases where the contract has been broken.

I proceed now to deal in the first instance with the suit brought by Sewbux and his partner, and consider to what extent the defendants in the first suit are entitled to reduce the plaintiffs' claim in respect of the balance of the contract price of the 113 tons delivered. The defendants contend first that it ought to be reduced by Rs. 192-13, which is at the rate of 1 anna a maund, because the wheat delivered was below the quality contracted for. I agree with Mr. Phillips that they are not entitled to any deduction on this score. There is no provision in the contract for it. Moreover, by their Agents they examined the wheat before delivery, and assuming it to be inferior to the quality contracted for, they might have refused to take it; but instead of doing so, they received the wheat, and cannot now claim com-

(1) WHITE, *J.*

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pensation for its alleged low quality. They must, I think, be considered to have accepted the 113 tons, as wheat which answered to the wheat in the contract.

As regards their claim to an allowance of Rs. 278-6 in respect of excess refraction, I am of opinion that they have made out their case. The right to such an allowance is reserved by the contract. They are not obliged to take wheat with a refraction above 6 per cent.; but if they do, they are entitled to an allowance for the excess. Mr. Gianno Kopulo says the refraction was 4⅛ per cent. in excess. There is some doubt whether the wheat which he refracted was a sample of the wheat delivered. I think, however, I must hold upon the evidence that it was. I accordingly allow that claim.

As regards the Rs. 96 for sundry survey fees, my disallowance of the claim for inferior quality disposes of Rs. 64 of them, the balance of Rs. 32 which was Mr. Gianno Kopulo's fees for making the refraction, which resulted in showing that there was an excess of 4⅛ per cent., I think I ought to allow.

The set-off of Rs. 496-13, claimed by the defendants in the first suit, arises out of the circumstance that they had sent in April a number of gunny bags up-country for the purpose of bringing down the wheat which was originally stipulated to be delivered during that month. In consequence of the inability of Sewbux and his partner to bring the wheat down in April, the bags were not used for the intended purpose, and are now in the possession of Sewbux and his partner. They applied on the 3rd of July 1877, by a letter to the defendants in the first suit, addressed to Messrs. Valetta and Co., the brokers in the transaction, that the defendants should send and take away the bags. The defendants declined on the ground that some of the bags had been used by Sewbux and his partner, and Mr. Gianno Kopulo's evidence shows that this was the case. I think the ground for refusing to take the bags back was a good one, at least so far as relates to such of them as had been used. Using the bags was an exercise of ownership over them. No evidence has been given on the part of Sewbux to show how many of them were used, or which enables me to distinguish between such as were used and such as were not used. Nor has Sewbux offered to return to the defendants those that were not used, and under these circumstances I allow the whole of the set-off of Rs. 496-13. This amount includes some trifling sum for work and labor done upon the bags before sending them Up-country, which I also allow.

I now come to the cross suit of Gladstone and others, in which they claim damages for non-delivery of the 87 tons. What I have to consider is, whether upon the evidence those plaintiffs are entitled to insist upon the delivery of the 87 tons.

The terms of the contract of the 10th of February 1877 as to payment are *cash on delivery*.

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The negotiations which took place between the parties in the month of May made no alteration in these terms.

In their plaint in the cross suit, the plaintiffs admit that this was the case, and that payment and delivery were to take place simultaneously; for they say in the 15th para: "The defendants did not and would not deliver the residue of the 200 tons of wheat according to contract, being 87 tons, *although the plaintiffs were ready and willing to receive and pay for the same.*"

It appears that after the receipt of 113 tons, the plaintiffs in the cross suit stopped taking delivery of the remainder on the alleged ground that the wheat offered to them was not up to the contract quality. The defendants deny this. I think it is unnecessary for me to determine what was the quality of the remainder of the wheat; for the evidence shows that the plaintiffs in the cross suit were not ready and willing to pay for the same on delivery.

The last parcel of the 113 tons, viz., 194 bags, was taken delivery of on the 29th May. The payments had not, as they ought to have done, kept pace with the deliveries; and at the last mentioned date the plaintiffs in the cross suit had only paid Rs. 4,000 out of Rs. 6,748. The oral evidence for the plaintiffs in the cross suit breaks off with the stoppage in taking delivery, and the correspondence that subsequently took place becomes of great importance.

The plaintiffs in the cross suit appear to have made no demand on the defendants for the delivery of the remaining 87 tons, but two days after the stoppage, viz., on the 31st of May, Sewbux and his partner wrote the following letter: "We have already delivered to you 1,234 bags of wheat, value Rs. 6,748-7, against which we have received Rs. 4,000 on account. We now beg to apply to you for the balance, *as well as to request you to take delivery of the remaining bags against contract for* 200 *tons, paying cash for same on delivery.* Should you fail to comply with the above request within 48 hours, we will consider the contract for the balance as cancelled, and will take the necessary steps to recover whatever will be due to us."

To this letter the plaintiffs in the cross suit on the same day reply in the following terms: "We are in receipt of your letter of this date. Owing to the fact that you have been delivering to us Jamali wheat of a very inferior quality we are compelled to retain in our hands for the present the balance nominally due to you according to your Bills."

The plaintiffs, it is to be remarked, take no notice of the request contained in the defendants' letter that they would take delivery of the remaining bags, paying cash for same on delivery, or of the statement of the defendants that the contract for the balance would be considered cancelled, unless that request was complied with, but the plaintiffs limit their reply to the application for the balance due in respect of the 113 tons already delivered, and excuse themselves for not paying that large balance on the

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ground of the inferiority of the wheat delivered, their claim in this respect being, according to their own evidence only, at the rate of one anna a maund, or Rs. 196.

On the same day the defendants in the cross suit write again to the plaintiffs a letter which contain the following passage :—"We have the balance ready for delivery, and we call on you to pay the balance due to us, *and to pay for and take delivery of the remaining portion of wheat at once*, otherwise we shall refuse to give further deliveries."

This letter elicits no reply, nor any communication from the plaintiffs in the cross suit.

After the stoppage in the delivery they expressed no willingness to pay for the 87 tons on delivery until they filed their written statement in the first suit, and their plaint in the cross suit; that is, not until some time after the first suit had been brought for the balance.

They are twice challenged by the defendants before suit to take delivery and pay for the remaining 87 tons. I think the defendants had good reason for challenging them on the subject, seeing that they kept back a considerable part of the price of the goods already delivered. They ignore the defendants' applications on the subject. This and their continuing to retain so large a balance against a comparatively insignificant claim leave no room for doubt, but that they would not have paid for the 87 tons on delivery if they had been delivered, and I view their conduct in this respect as tantamount to a refusal to pay on delivery.

Their conduct in connexion with the letters to which I have referred also furnishes evidence that they had, before they brought their cross suit, acquiesced in the cancelment of the contract as regards the 87 tons remaining undelivered.

But whether they ought or ought not to be considered as having acquiesced in its cancelment, I am of opinion that they cannot succeed in a suit against Sewbux and his partner for not delivering the remaining 87 tons, unless they show, which they have not done, that they on their part were willing to pay for them on delivery. Several cases were cited by Mr. JACKSON to show that they could so insist.

There were cases in which the goods were by the contract deliverable by instalments, each instalment to be paid for on delivery. The failure to pay for one or more instalments on delivery was held not to entitle the seller to refuse to deliver a subsequent instalment, but it will be found that that was where the buyer was ready to comply with his contract as regards the subsequent instalment and pay for it on delivery. *Withe* vs. *Reynolds*, 2 B. and Ad., 882, contains the law that applies to the facts of the present one. No question arose there, any more than here, as to the ability to pay, but only as to the willingness to do so.

I may also refer to section 51 of the Indian Contract Act, relating to the performance of reciprocal promises, and the illustrations appended to the section.

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The result is, that I shall give a decree to the plaintiffs in the first suit for the amount claimed by them, less the three following sums, viz., Rs. 278-6 for excess refraction, Rs. 32 for the survey fee, and Rs. 496-13, the value of the gunny bags, aggregating Rs. 807-3-3, in other words a decree to Sewbux and his partner for Rs. 1,941-3-9 with costs. The cross suit of Gladstone and others I shall dismiss with costs.

Against this decision the plaintiffs in the cross suit appealed.

Jackson (for the Appellants) contended that the appellants had a right to treat the contract of the 10th February as broken in April, and that they did so treat it. All that the evidence went to show was a mere forbearance on their part from insisting after breach upon their undoubted right to sue for damages as from the 15th of April when the defendants put it out of their power to give delivery in terms of the contract.

The appellants were now entitled to the full measure of damages as from that time, making allowances only for the deliveries actually taken in May, at the request of, and for the sole benefit of the defendants—*Ogle* vs. *Vane*, L. R., 2 Q. B., 275; *Freith* vs. *Burr*, L. R., 9 C. P., 208. They had not bound themselves to extend the time for the performance of the original contract, nor had they shown any intention to substitute a new arrangement in place of the old agreement. See *Darnley* vs. *Proprietors, &c., of the London and Chatham Railway*, L. R., 2 E. and I. App., 43.

Phillips (for the Respondents) contended that the effect of the negotiations between the parties was to extend the time for the performance of the original contract. By taking deliveries in May, the plaintiffs had treated the contract as then subsisting, and that being so, substantial inferiority alone could have justified them in rejecting the wheat tendered. No such substantial inferiority had been proved. The wheat delivered, as also that offered for delivery, was described by the surveyors as Jamali—the kind of wheat contracted for. Up-country wheat was not contracted for. No dissatisfaction with the wheat was ever shown in writing until the 31st of May, and that dissatisfaction arose from a wrong idea as to what the plaintiffs ought to have received.

[GARTH, *C.J.*—The breach, it seems, of the contract took place in April, but the plaintiffs, without waiving their rights to sue on

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the breach, continued to take deliveries which would go towards healing the breach *pro tanto*—*Ogle* vs. *Vane*, L. R., 2 Q. B., 275.]

That case had no application. There the breach had happened, and it was necessary that there should be accord and satisfaction. Here the breach had not taken place. Deliveries were taken under the contract, and demands were made on the contract. No accord and satisfaction were necessary.

If the wheat were not as contracted for, the plaintiffs could claim nothing more than damages.

[GARTH, *C.J.*—It is still a question of damages whether the breach was in April or on the 31st of May.]

Jackson, in reply.

The following judgments were delivered by the Court (1) :—

PONTIFEX, *J.* PONTIFEX, *J.* :—

These are cross suits in which the learned Judge in the Court below has given a decree in favour of Sewbux, the plaintiff in one and defendant in the other of the suits; against which decree Gladstone and others, who are the partners in the firm of Gillanders, Arbuthnot & Co., have appealed.

The suits arose out of a contract between the parties made on the 10th of February 1877, evidenced by bought and sold notes.

The sold note was in the following terms :—

CALCUTTA, 10*th February* 1877.

"MESSRS. GOLAB ROY SEWBUX.

DEAR SIRS,

We have this day sold by your order, and for your account, to Messrs. Gillanders, Arbuthnot & Co., the following (200) two hundred tons of Jamali wheat (Patna and Revilgunge excepted) of the average quality of the season 1877-78 at Rs. 2-3, (two rupees and three annas) per bazar maund. Refraction guaranteed 4 per cent. with usual allowance up to 6 per cent., exceeding which seller to re-clean the seed at his expense within a week.

(1) GARTH, *C.J.*, and PONTIFEX, *J.*

failing which buyers to have the option of cancelling that portion of the contract tendered, or of buying against seller, or of taking the parcel as it stands with usual allowance of excess refraction.

Buyers to forward bags by Rail to sellers' address at sellers' expense not later than the 15th March on seven days' notice from sellers.

Buyers to have the option of weighing and sampling 10 per cent. of the bags to ascertain the weight and refraction.

Terms of Sale—Cash on delivery, which is to be given and taken as follows:—

From Howrah Railway Station during all April, on fifteen days' notice from buyers.

Brokerage at one per cent.

Yours most obediently,
(Sd.) N. J. VALETTA & Co.,
Produce Brokers.

N.B.—Any disputes arising from this contract to be finally settled by the selling brokers."

The bought note was in the same terms, with an addition of the following words:—"Should the sellers be unable to bring the wheat down by Rail, the buyers are then to take delivery from Calcutta."

The contract was, therefore, for Jamali wheat, and from the express exception of Patna and Revilgunge Jamali, which is the intermediate quality of Jamali wheat, it would seem that the parties intended the contract to apply to up-country Jamali wheat, which is the best quality, rather than to Eastern Bengal Jamali, which is the lowest quality.

The time for delivery was during all April on fifteen days' notice from buyers, and the additional words in the bought note were introduced in consequence of the block existing on the East Indian Railway at that date which must have been within the knowledge of both parties.

As a matter of fact, the sellers were unable to deliver in April, but partial deliveries were given and taken at the latter end of May.

At the end of May, Messrs. Gillanders & Co. refused to take further delivery of the wheat which Sewbux was then ready and

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willing to offer, alleging that the wheat offered was of a quality greatly inferior to that contracted for.

The learned Judge in the Court below has held on the evidence of the conduct of the parties that the contract time was extended by mutual agreement, and that the contract was in continuing force at the end of May when the appellants refused to take further delivery, and further that the wheat offered by Sewbux was of a quality conformable to the requirements of the contract.

With respect to the question of quality, I confess I feel very considerable difficulty. An analysis of the quality of the wheat of which delivery was actually taken, namely 1,234 bags, or 113 tons, was made by Messrs. Rushton and Tiffo at the instance of the appellants, and they reported that the appellants were entitled to an allowance of no more than one anna per maund for inferiority of quality.

This report scarcely bears out the complaints made by the appellants as to quality during the time they took the deliveries in May. And if the question between the parties turned upon quality alone, it would have been far more material that the quality of the wheat which Sewbux was ready to deliver should have been tested, instead of that which had been delivered and accepted; for I apprehend if the contract was continuing, the acceptance by the appellants of the wheat, which was in fact delivered, was in law an admission of its sufficient quality, except with respect to refraction. It appears, also, that the wheat delivered was refracted by Mr. Gianno Kopulo, and the result of such refraction was, that it contained 8$\frac{1}{8}$ per cent. of foreign matter, which was 4$\frac{1}{8}$ per cent. beyond the contract allowance. But the appellants, if the contract was in force, must, in accordance with its terms, be taken to have elected to accept the 110 tons as they stood, and on the decree of the Court below have received the usual allowance for excess refraction. But there is no evidence that the wheat, which the appellants refused to take, contained foreign matter in excess of 6 per cent., which would have entitled the appellants to cancel that portion of the contract beyond the statement of some of the witnesses examined on behalf of Sewbux, who said that the wheat Sewbux was ready

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to deliver was of precisely the same quality as that already delivered by him, and the presumption that the wheat undelivered came from the same pile as that which had been delivered. But there is, on the other hand, evidence of the appellants' witnesses which shows that the pile did not remain the same, but was from time to time improved, though according to such evidence only in an illusory and ineffectual way. Upon the question of quality, therefore, I should have great difficulty in coming to a conclusion differing from that carefully arrived at by the learned Judge who tried the case. But in my opinion the appellants are entitled to succeed on the first of their grounds of appeal, namely, that there was no binding agreement on the part of the appellants to give time for the fulfilment of the contract after April, but merely a forbearance on their part to pursue their rights. What happened was as follows:—

On the 9th April the appellants wrote—

"Please note that we require our Jamali wheat bought from you for April delivery at once, as you have been already informed by Messrs. N. J. Valetta & Co."

The fifteen days' notice stipulated for by the contract would expire on the 24th April.

But on the 16th of April appellants wrote again:—

"Having several times instructed you, both through our brokers Messrs. N. J. Valetta & Co., and direct, to deliver to us at once the 200 tons Jamali wheat, bought from you for delivery in April on fifteen days' notice from us as per contract, we have now to inform you that the wheat having been re-sold by us, with shipment guaranteed in April, and freight for the same also having been engaged for April loading, unless you arrange for the delivery to us of the stuff without further delay, we shall proceed to buy wheat in the bazar at current prices, and shall hold you responsible for any price paid by us in excess of our contract price with you, namely, Rs. 2-3 per bazar maund." And on the 23rd April appellants again wrote:—

"As you have failed to deliver to us the 200 tons Jamali wheat sold to us by you for delivery in April on fifteen days' notice from us, we beg to note that we hold you responsible for the difference between the contract price of Rs. 2-3 per bazar maund,

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and Rs. 3-6 per bazar maund, which was the market price on the first day, namely the 19th instant, on which Jamali wheat was obtained on the spot, this season in Calcutta since your failure to carry out your contract."

It is not necessary to enquire whether the appellants were justified before the end, or at least before the 24th of April, in assuming that Sewbux could not carry out his contract. As a matter of fact, he was unable to do so, and the appellants were quite within their rights, when on the 11th of May they instructed their solicitors to write the following letter :—

"We are instructed by Messrs. Gillanders, Arbuthnot & Co. to call upon you for the immediate payment to us, as their attorneys, of the sum of Rs. 6,483-12-0, being the difference in price on 200 tons Jamali wheat which you have failed to deliver in terms of your contract, made through Messrs. N. J. Valetta & Co., of the 10th February last, and which you sold at Rs. 2-3 per bazar maund.

"Should you fail to comply with our request, our instructions are to take legal proceedings against you for recovery of the same."

At the date of that letter there was an absolute breach of contract on the part of Sewbux, and the appellants were entitled to consider the contract at an end, and to sue for damages. The question remains: Did they afterwards wholly, or to any, and what extent, relinquish that right?

It would appear that, after the letter of the 11th of May, Sewbux must have made some request for extending the time of the contract, offering to give delivery of 350 bags of Jamali wheat. But the contract having expired, or at all events having been completely put an end to by the letter of May 11th, its time could not be extended except by fresh agreement. In answer to Sewbux's request and offer, the appellants on May 19th wrote the following letter :—

"We will take delivery of 350 bags Jamali wheat on the 21st instant. Please note, however, that our doing this will, in no way, prejudice our claim on you on account of the remaining 175 tons still undelivered."

Now, it seems to me that this letter can only be read in one

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way. The appellants say: "We are willing to take the 350 bags in part discharge of your liability under the broken contract; but we especially guard against our doing so prejudicing our right to damages, except so far as such right will be diminished in account by the deliveries we may choose to take." In other words, you may discharge yourself from the damages we claim to the extent, and to the extent only, of the value of the wheat we at your request may choose to accept;" and it appears to me that, after that letter of the 19th of May, the appellants were entitled to refuse further deliveries at any time at their mere caprice, and whether or not the wheat tendered was of a quality conformable to the agreements of the then no longer existing contract. In *Freith* vs. *Burr*, L. R., 9 C. P., 213, Lord COLERIDGE says: "The fair result of the cases is whether the acts and conduct of the party evince an intention no longer to be bound by the contract." And it is difficult to see how the appellants could more clearly evince their intention to be no longer bound by the contract than by the letters of the 11th and 19th of May.

Under these circumstances, it is immaterial to inquire as to the quality of the wheat refused. The appellants were entitled, with or without reason, to refuse to take further deliveries, and to sue for damages in respect of the respondents' breach of contract, taking into account the value of wheat received.

I think, therefore, there should have been a decree in favor of the appellants in their suit in the Court below for the 87 tons of wheat remaining undelivered, and that the damages should have been, and must now be, assessed at the rate of one rupee per maund, the difference between the contract price and the market price at the end of April.

The Court below has already given or allowed the appellants proper amounts for excess refraction and for value of bags; and, therefore, it will not be necessary to interfere with the decree in these respects. But I think the appellants must have the costs of their suit on scale 2, including the costs of the commission in that suit in the Court below, and the respondents will, therefore, be directed to refund the costs of that suit which they may have received under the decree appealed from, and to pay the appellants their costs of that suit and of this appeal on scale 2.

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With respect to the suit in which the appellants were defendants, it will not be necessary to interfere with the decree appealed from. The appellants, when they accepted the wheat of which they took delivery in part satisfaction of their demand for damages against the respondents, were, in my opinion, bound to pay for it, and were not entitled to retain, as they did, upwards of Rs. 2,000 on account of alleged inferiority of quality. As they insisted on retaining that amount they rendered the respondents' suit necessary, and have been properly made to pay the costs of it.

GARTH, *C.J.* GARTH, *C.J.* :—

I agree in the conclusion arrived at by my learned colleague, and upon these grounds :—

At the end of April 1878, the defendants Sewbux and Bullub Doss had broken their contract with the plaintiffs, and the latter were then entitled to recover damages against them for the non-delivery of the wheat contracted for,—the proper measure of such damages being the difference between the contract price, and the price of such wheat in the market at that time.

But it was contended by the defendants, and decided by the learned Judge in the Court below, that the parties had by mutual agreement extended the time for the delivery of the wheat until the end of May or a reasonable time afterwards.

Now, I do not doubt that by the law of this country the time for the performance of such a contract might by mutual consent be so enlarged (see Contract Act, section 63) ; but it appears to me that there is no sufficient evidence of such consent in the present instance.

The letter of the plaintiffs of the 19th May, which is very guarded in its terms, only expressed a willingness on their part to accept delivery of 350 bags on the 21st May, (in satisfaction of the defendants' obligation *pro tanto*), but without prejudice to the plaintiffs' right to sue the defendants for the non-delivery of the residue of the wheat, viz., 175 tons, and there is nothing, as it seems to me, in the subsequent correspondence or conduct of the parties which amounts to more than a consent by the plaintiffs to accept further portions of the 175 tons upon similar conditions. No doubt, so far as the plaintiffs were willing to accept those

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further quantities, the defendants' breach of contract would be waived *pro tanto*, but I consider that such acceptance was altogether optional with the plaintiffs.

Their position, as I take it, was very much what the plaintiff's position was in the case of *Ogle* vs. *Vane*, L. R., 2 Q. B., 281, where the defendant had failed to deliver iron to the plaintiff by a certain day pursuant to contract, and the plaintiff, after waiting some time beyond that day to see if the defendant would deliver the iron, sued him for damages as upon the original breach. Mr. Justice BLACKBURN there observes: "The plaintiff, instead of insisting on his strict rights, said I will wait, but I do not bind myself to wait;" and the plaintiff was there held to be entitled to damages calculated as upon the day when the contract was first broken. So, here, I think that the plaintiff is entitled to damages for the non-delivery of the 87 tons at the end of April; and that the measure of damages should be Re. 1 per maund, which I find to be the difference between the contract price and the price of such wheat in the market at that time.

In this view of the case it becomes unnecessary to determine:—

1*st*.—Whether the plaintiffs were ready and willing to pay for the wheat on delivery at the end of May; or, 2*ndly*—Whether the quality of the wheat, which the defendants were ready to deliver at that time, was in accordance with the contract.

But I think it fair to the plaintiffs to say, that had it been necessary to decide these two questions, I should have decided them in their favor.

I am quite satisfied from the evidence that the wheat, which was actually delivered, was not equal to the average quality of Jamali wheat for the season 1877-78; and I believe that the defendants were availing themselves of the pressure under which they knew the plaintiffs were labouring to compel them, if possible, to take inferior goods at the contract price. It is in the highest degree improbable that, if the wheat offered by the defendants at the end of May was really of good quality, the plaintiffs, in the then state of the market, would have refused to receive it. I see no reason whatever for supposing that, if the defendants had dealt fairly and honestly by the plaintiffs, the latter would have

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been unwilling to pay for the wheat at once; and I have no doubt that the real explanation why the balance actually due was not paid earlier, was because the plaintiffs were legitimately endeavouring, by the retention of that balance, to oblige the defendants, if they could, to make amends for their previous default by supplying them with a better quality of wheat.

The judgment of the Court below will, therefore, be reversed, and the plaintiffs will have a decree for damages at the rate of Re. 1 per maund, on the 87 tons undelivered, with costs in both Courts on scale 2.

[ORIGINAL CIVIL JURISDICTION.]

March 25th.

BRIJO NATH DASS . . . . . PLAINTIFF;

AND

JUGGERNATH DASS . . . . . DEFENDANT.

Solicitor's Lien—Set off—Act X of 1877, *sections* 111 *and* 221.

In a redemption suit in which it was directed that the plaintiff (the mortgagor) should pay to the defendant (the mortgagee) the amount of the mortgage money, and that the defendant should pay to the plaintiff the cost of the suit, it was *held* that the plaintiff was entitled to set off the amount payable to him against the amount which he was ordered to pay to the defendant notwithstanding any claim the solicitors of the latter might have against him in respect of his costs of the suit.

Act X of 1877, sections 111 and 221, discussed.

RULE to show cause why the plaintiff should not be allowed to set off an amount for costs payable to him by the defendant against the sum which he had been ordered to pay to the defendant under a decree on redemption suit.

Jackson showed cause.

T. A. Apcar in support of the Rule.

The facts and the arguments of Counsel are sufficiently set forth in the following judgment, which was delivered by

PONTIFEX, *J.*

PONTIFEX, *J.*:—

This is an application in a redemption suit, by the decree in

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which the plaintiff (the mortgagor) was directed to pay the mortgage money and interest to the defendant (the mortgagee), but the defendant was directed to pay the plaintiff the costs of the suit.

The plaintiff, who has taxed his costs, now seeks to set off the amount payable to him under the taxation against the mortgage money which he is liable to pay under the decree.

The application is resisted by the solicitor of the defendant, who claims a lien on the mortgage money which the plaintiff has been directed by the decree to pay; such lien being claimed in respect of the costs owing to the solicitor by the defendant for conducting the suit on his behalf.

In support of the plaintiffs' application, *Bawtree* vs. *Watson*, 2 Keen, 713, and *Verity* vs. *Wylde*, 4 Drewry, 427, have been referred to as authorities to show that where a decree directs mutual payments between the parties to the cause, the lien of the solicitor does not extend to all sums coming to the credit of his client, but only to the ultimate balance to be paid to him in the suit.

On the other hand, two cases decided by Lord CAIRNS, namely, *Ex-parte Cleland*, L. R., 2 Ch. App., 808, and *In re Bank of Hindustan*, L. R., 3 Ch. App., 125, have been cited as authorities to show that the lien of a solicitor on a sum due or payable to his client, prevents a set-off against a sum due from his client. Neither of these cases, however, relates to mutual payments under the same decree; and in each of these cases the amount sought to be set off was an unconnected or independent demand. These cases are not, in my opinion, authorities to govern the rights of the parties in a redemption suit.

But the latter part of section 221 of the new Code of Civil Procedure is also relied on by the defendant's solicitor as preventing a set off. The same provision is attached to section 111, where it not improperly applies; for that section permits a set off of independent or unconnected demands which, except for the provisions of that section, would not have been the subjects of set-off. Though whether after permittinig a set off to be pleaded so early in a suit as by the defendant's written statement, it

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was desirable to sustain the lien to that extent instead of following the doctrine of *Bawtree* vs. *Watson*, and *Verity* vs. *Wylde*, may be questionable, seeing that the lien has always been treated as merely an indemnity to the solicitor for his exertions in recovering a fund in a particular suit. As however section 111 treats the set off as if a cross suit had been instituted, it may have been considered advisable to leave the question of lien as it would have continued if it had been necessary to institute a cross suit. But it is difficult to understand how this provision came to be attached to section 221. As it stands, it seems to me to assume that it is usual for a decree to make costs payable to the pleader, instead of to the party, which practice, if it existed, would of itself negative the right of set off; and it leaves wholly undefined what is intended by the word "lien." At all events, in the present case, it cannot be said that any costs are payable to the defendant's solicitor under the decree.

If I am to decide that the provision applied in the present case, I should be giving to the solicitor of an unsuccessful litigant, a preference and priority over the successful litigant; and this preference would be given in respect of the defendants costs of a suit, which I must assume ought not to have been defended, as the defendant has been ordered to pay the plaintiff's costs of it. If, indeed, I am so to decide, I should, in fact, go far towards rendering nugatory that part of the decree which directs the defendant to pay the plaintiff's costs of suit.

The present application arising out of a redemption suit, I am prepared to hold that the plaintiff is entitled to set off, or deduct the amount of the costs payable to him under the decree, from the mortgage monies payable by him to the defendant, notwithstanding any claim the defendant's solicitor may have against the defendant in respect of the defendant's costs of suit, and I therefore make the order asked for, and I must give the plaintiff the costs of this application.

[CIVIL APPELLATE JURISDICTION.]

KHAJAH ASHANULLA . . . . . APPELLANT,

AND

KAROONAMOYI CHOWDHRY . . . . . RESPONDENT;

AND

ROHINI CHOWDHRANI. . . . . RESPONDENT,

AND

KISHEN GOBIND DAS . . . . . RESPONDENT.

1879 *Dec.* 15*th and March* 28*th.*

Nos. 40 and 41; 42 and 43; 44 and 45 of 1878.

Appeal to Privy Council—Value of subject-matter—Decree indirectly involving question of title to property of value of Rs. 10,000—*Act X of* 1877, *section* 596—*Stay of Execution of High Court decree pending appeal to Privy Council—Act X of* 1877, *section* 608.

Three different plaintiffs claiming through the same original title to be the owners of a certain mehal, sued the same defendant in separate suits for possession, and for the mesne profits of their respective shares. The defence raised being the same in each case, the suits were heard together, the result being that in both the lower Courts and in the High Court the plaintiffs obtained a decree for their claims. The aggregate value of the three suits amounted to more than Rs. 10,000 though the value of each suit was under that sum. The defendant applied to be allowed to appeal in each case to Her Majesty in Council. *Held*, that he was entitled to have each of the three cases admitted under the second clause of section 596 of Act X of 1877, as the decree in each case involved indirectly a question of title to property of the amount or value of Rs. 10,000.

The Court has power, under section 608, to stay execution of a decree of the High Court in a suit subsequently appealed to Her Majesty in Council.

Quære.—Whether the Court has power to order restitution of possession of property already taken in execution of its own decree pending an appeal to the Privy Council.

PRIVY COUNCIL Appeals from a decision of a Division Bench of the High Court of Judicature at Fort William in Bengal.

This was an application for the admission of three appeals to the Privy Council on behalf of one Khajah Ashanulla, the unsuccessful defendant, in three suits brought for possession, and for

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KHAJAH ASHANULLA v. KAROONA-MOYI CHOW-DHRY.

Statement.

the mesne profits of a certain mehal. The first and second suits were instituted by the two widows of the late Gour Mohun Roy Chowdhry, who claimed through their husband respectively 4½ annas and 3½ annas shares, and the third by Kishen Gobind Das and his two brothers, claiming the remaining 8 annas share in the mehal. All three suits were similar in character and in the relief sought. It was alleged by the plaintiffs that the mehal in question had been sold at auction in Joisto 1257, under Regulation VIII of 1819, and purchased by Kishen Gobind Das, who obtained a taluqdari settlement at an annual jumma of Rs. 2,342-0-2 for the period from 1257 to 1268, and that Gour Mohun Roy Chowdhry had purchased an 8 annas share therein from Kishen Gobind. The defendant, on the other hand, pleaded limitation, alleging that, on the expiry of the term of settlement in 1268, no attempt had been made by the plaintiffs to obtain a re-settlement at a proper jumma; that the Government had re-settled the mehal for the year 1269 with one Prankrisna Dut at an increased jumma; that subsequently he, the appellant, had purchased the whole mehal in good faith from the Government, who had, after the expiration of Prankrisna Dut's term of settlement, obtained khas possession. The Subordinate Judge, and on appeal, the Judge of Tipperah, gave the plaintiffs a decree in each suit. On further appeal to the High Court the decisions of the lower Courts were upheld with costs in all the Courts. The defendant then applied for admission of an appeal in each case to the Privy Council.

In none of the suits was the relief claimed of the value of Rs. 10,000, but the aggregate value of the property claimed in the three suits amounted to more than that sum.

Woodroffe and Baboo *Durga Mohun Dass*, for the Appellant, urged that, inasmuch as the three suits turned upon the same question, the title of the appellant being in issue in each suit, and the decree in one applying in principle to the other two suits, the appellant was entitled to ask for admission of the appeals under the second paragraph of section 596 of Act X of 1877, on the ground that the decree in each case must be taken to involve indirectly a question of title to property of the value of Rs. 10,000.—*Anundchunder Bose* vs. *Broughton*, 9 B. L. R., 423.

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Order.

Paul (Advocate-General) and Moonshee *Serajul Islam*, for the Respondents, contended that the defendant not having objected to the valuation of the suits made by the plaintiffs in the Court of First Instance, and having in subsequent appeals in which he was appellant treated that valuation as correct and paid stamp duty thereon, was debarred from showing that the value of the property in suit was greater than the aggregate valuation of the suits. *Ranee Bhuggobutty Debia*, 14 W. R., 62; *In re Lekhraj Roy* vs. *Kunkya Singh* 17 W. R., 485.

Woodroffe, in reply, referred to L. R., 1 Ind. Ap., 317.

The following order admitting the appeals was made by

PONTIFEX, *J.*

PONTIFEX, *J.* :—

I think the appellant is entitled to have each of these three cases admitted under the second clause of section 596 of Act X of 1877, as the decree in each case involves indirectly a question of title to property of the amount or value of Rs. 10,000.

I do not feel myself able to admit these appeals upon questions of fact, because the cases having been heard by the Court on special appeal, the facts have never been, and can never be, before this Court.

I reserve liberty to the respondents to England to select any one of the three appeals for the purpose of opposing it before the Privy Council; and, if such selection be made by the respondents, then, for the purpose of saving expense to the parties, the other two appeals, not so selected, will be stayed until the appeal so selected has been disposed of.

The respondents are to have two months from this date to make such selection. But if they fail to agree, and neglect to inform the appellant and the officer of this Court within that time that they have made such selection, the three appeals will proceed in ordinary course.

The respondents selected the first of the appeals for the purpose of opposing it in the Privy Council within the time directed by the order. Meanwhile they proceeded to take out execution of the decrees of the High Court in the three suits, and obtained possession of the lands, and an application was now made to the learned Judge who made the order above for a stay

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KHAJAH ASHANULLA v. KAROONA-MOYI CHOW-DHRY.

Argument.

of further execution proceedings for mesne profit and costs, pending the appeals to the Privy Council.

The affidavit on which the application was based alleged that if execution were allowed to proceed for the mesne profits and costs of the suits in the several courts, the respondents being poor, it would be difficult for the appellant, in the event of his being successful on final appeal, to recover the amounts taken in execution.

A counter-affidavit was put in by the am-mooktear of the respondents, in which he denied the allegation of poverty or inability to make good, if necessary, the amount, which might be taken by them in execution for mesne profits and costs.

Woodroffe appeared for the Petitioner.

Moonshee *Serajul Islam*, for the Respondents.

Woodroffe.—Possession of the lands in dispute has been taken by the respondents in part execution of the decree, but the mesne profits and costs not having been ascertained, the latter part of the decree has not yet been executed. Under these circumstances, the Court has power, under section 608 of the Code of Civil Procedure, to order stay of further execution proceedings, and to direct restitution of possession pending the result of the appeal to England. The case of *Joynarain Patlur* vs. *Russick Mohun Bannerjee*, 4 Wym., 104, in which a Full Bench of this Court held that, after execution had once gone out under a decree of the High Court, subsequently appealed to Her Majesty in Council, it was beyond the power of the High Court to set aside the execution is no authority against me as it does not apply now. That case was decided upon Regulation XXI of 1797, the terms of which were very much narrower than those of section 608. Clause (d) of that section is wide enough to give the Court power not only to stay further execution but to order restitution of possession to the appellant.

[PONTIFEX, *J.*—How does that section apply to you?]

The clause is general; it empowers the Court to place *any party* under such conditions, or to give such other directions respecting the subject-matter of the appeal, as it thinks fit. The

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Order.

latter part of clause (d) is distinct from the other, and ought to be read as a separate sub-section of section 608.

Moonshee Serajul Islam.—Possession of the land having been taken, restitution cannot be made. The execution of the decree cannot be sub-divided in the way proposed by staying execution of that part of the decree which deals with the mesne profit. The Full Bench decision is conclusive on the point that once execution has issued the Court has no power to stay execution of the decree.

[PONTIFEX, *J.*—Why cannot I order stay of further execution? The Full Bench decision does not decide that this Court cannot do so.]

The other side has not shown any sufficient cause for the Court to interfere in the matter. The affidavit merely alleges that, in the event of appellant succeeding in his appeal, it will be difficult, on account of the respondents not having sufficient property to satisfy the demand, to recover the amount taken in execution for the mesne profits and costs from them.

PONTIFEX, *J.* :— PONTIFEX, *J.*

I shall make this order, that on the appellant paying all costs of suit and of execution, up to the present time, and the costs of this application, and giving proper security to the satisfaction of the Court for the amount of the mesne profits for which execution has been taken out, with 12 per cent. interest thereon from now until payment if appellant fail an appeal, further execution in respect of the mesne profits will be stayed.

Woodroffe.—Does not your lordship think you can make an order for restitution under section 608 clause (d) as to that part of the decree which has been executed?

PONTIFEX *J.* :—

I do not say I can't, but I won't make such order in this case. I am not altogether satisfied as to the affidavits of your clients' mookhtar as to the respondents' means and position.

[CIVIL APPELLATE JURISDICTION.]

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Feby. 12*th.*

No. 634 of 1878.

DWARKA NATH MISSER ... (DEFENDANT), APPELLANT;

AND

HURRISH CHUNDER ROY CHOWDHRY AND OTHERS ... ... (PLAINTIFFS), RESPONDENTS.

Occupancy, Right of—Transfer—Abandonment of Right of Occupancy.

The right of two of three joint tenants of a ryoti tenure, held under the plaintiffs, was sold in execution of a decree of a Civil Court, and purchased by A, who continued the former holders in immediate occupancy of the lands. The plaintiffs sued for possession. No special custom allowing the transfer in the district of such tenures having been proved, *Held*, that there was no transfer by the sale to A, of the occupancy rights of the ryots; that the ryots had, by agreeing to hold under A, abandoned their rights of occupancy as much as if they had gone away from the lands; and that therefore plaintiffs were entitled to khas possession.

Cf.—*Narendro Narayan Roy Chowdhry* vs. *Ishan Chandra Sen*, 13 B. L. R., F. B., 274.

APPEAL from an Appellate Decree, passed by the Subordinate Judge of the 24-Pergunnahs, modifying the decree of the second Moonsiff of that district.

This was a suit for khas possession of certain lands which had been purchased by the first defendant at a sale in execution of a decree of a Civil Court against two of his co-defendants, who had been joint tenants under the plaintiff with a third ryot—originally with two other ryots, but the fourth had already separated his share in the holding. The plaint alleged that the tenures of the ryots were not transferable, and that that being so, the plaintiffs had a right to eject the auction-purchaser who now claimed to hold the tenures as his own. It seems that the ryot defendants attorned to the auction-purchaser, and that he allowed them to retain portions of their former holdings. Some part of the lands were, however, let out by the purchaser to other tenants.

The plaintiffs never recognized the transfer under the execution sale either by registration or acceptance of rent.

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DWARKA NATH MISSER v. HURRISH CHUNDER ROY CHOWDHRY.

The defendants contended that the tenures were transferable by local custom. To prove this, a number of witnesses were called, and some evidence was given that there had been casual transfers of rights of occupancy in the neighbourhood, but it appeared that, as a rule, the landlords never recognised such transfers as of right.

Judgment.

In the lower Court the Moonsiff, being of opinion that inasmuch as the tenant whose share was not sold in execution of the decree against his joint holders, still continued to occupy under the plaintiffs, and the other two still held their lands as they had done before, the plaintiffs could not obtain khas possession, passed a decree merely declaring the holdings not to be transferable, and the purchase at the auction sale void as against the plaintiffs.

The lower Appellate Court held that the auction-purchaser was a trespasser; that there had been such a forfeiture by the ryots of the tenure as to entitle the landlord to re-enter; and that the fact of the holding having been joint threw no obstacle in the way of the plaintiffs' right of re-entry, as a definite share of the holding had been sold at the execution sale, and it accordingly gave a decree for khas possession.

Dwarkanath Misser, the principal defendant, now appealed to the High Court.

Baboo *Rashbeharry Ghose*, and Baboo *Gurudass Banerjee*, for the Appellant.

Baboo *Opendro Chunder Bose*, for the Respondents.

The following judgments were delivered by the High Court (1):—

JACKSON, *J.* :— JACKSON, *J.*

Notwithstanding the remarkable ingenuity displayed by Baboo Rashbeharry Ghose, I am unable to discover that his argument amounts to anything more than an attempt to establish in an exceptional case that rights of occupancy are transferable. The mode in which, and the circumstances under which, the power of transferring such rights is sought to be exercised will continually

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vary; and, although it might be possible to lay down a comprehensive rule which should suffice to exclude other such conceivable cases, I am not, for my part, anxious to frame any such formula. As I said during the argument, I desire in every case coming before me, to decide *that* case to the best of my ability. Of course, when in any decided cases, whether by myself or other Judges of the Court, we come upon arguments and considerations which are applicable to the case before us, although the two cases may not be precisely alike, I am very willing and ready to use those arguments. Now, the matter under consideration in one form did undoubtedly come before a Full Bench of this Court in 13 B. L. R., 274—*Narendro Narayan Roy Chowdhry* vs. *Ishan Chandra Sen*, and there the learned Chief Justice Sir RICHARD COUCH and four other Judges, of whom I was one, held unanimously that the right of occupancy which a certain ryot called A had acquired under section 6 of Bengal Act VIII of 1869 at the time of the sale to B was not transferable; and it was further held in that case that by ceasing himself to hold or cultivate the land it might be considered that A had abandoned his right or that the right had ceased, and that no right, therefore, remained in A or his heirs such as would prevent the plaintiff from ejecting B.

It is sought to distinguish that case from the present on the ground that the outgoing tenants or persons originally in enjoyment of the right of occupancy had not voluntarily sold their rights, but the sale was the act of the Court; and, further, that the defendants, on becoming purchasers of such right as they alleged themselves to be, had continued the former holders in immediate occupancy of the land.

Now, in the case before the Full Bench, the fact that the former occupant ryot had gone out was no doubt referred to as a material circumstance. If it be true that the former occupant ryots are still upon the land, that circumstance does not exist in the same shape, but does in this shape that they are upon the land no longer as ryots with a right of occupancy but as tenants-at-will under the so-called tenant with right of occupancy. By accepting that position it seems to me that they have just as much abandoned the right of occupancy as if they had gone away from the land.

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As regards the mode of transfer, it is clear there is no ground for distinguishing a voluntary sale from a sale in execution. If a sale by private contract would validly pass a right of occupancy, then a sale in execution of a decree would equally pass it, and *vice versâ*. So far, I think, the case clearly is governed by the authority of the Full Bench ruling.

Then it was said that one of the original occupant ryots was still in possession, and as there were four such joint ryots, and one of them still remains, the right of occupancy must be considered to have inured to the survivor and the other defendants were entitled to hold jointly with him. Now, that remaining occupant ryot is no party to the suit, and from that circumstance, as well as from the findings of the Court below, and from the allegations in the plaint, I think it clear that that ryots' share has been separated; and is now separately occupied by him, and that the controversy is as regards the separate shares of the other three. This argument, therefore, cannot be used on the side of the plaintiff.

On the whole, it seems to me clear that this is simply another attempt in a different shape to compel the recognition of purchases of rights of occupancy, which, in the absence of clear, well-defined custom to that effect, cannot prevail. That there was no such custom in the locality is clear from the findings of the Court below. The special appeal will be dismissed with costs. This judgment will govern Nos. 635 and 636.

McDONELL, *J.* :— McDONELL, *J.*

I concur.

[CRIMINAL APPELLATE JURISDICTION.]

1879 *March* 18*th*.

No. 146 of 1879.

IN THE MATTER OF BIYOGI BHAGUT . . . APPELLANT.

Dismissal of Complaint—Prosecution under section 211 *of Penal Code (Act XLV of* 1860)—*Right of complainant to be examined.*

A charge of burglary and theft having been preferred against two persons, the Magistrate, before whom the charge was laid, after comparing the petition of complaint with the papers submitted to him by the Police, who had made an enquiry and reported the charge to be false, directed, without having taken the examination of the complainant, that the case should be struck out, and that proceedings should be instituted against the complainant under section 182 of the Indian Penal Code. Proceedings were accordingly taken, and the complainant was ultimately tried and found guilty of an offence under section 211.

Held, on appeal, that the proceedings had been irregular and should be quashed; that the Magistrate should be directed to re-open the enquiry into the charge of burglary and theft, first examining the complainant; and that, if after such examination he should be of opinion that the charge was false, the appellant might be proceeded against under section 211 of the Penal Code.

THE facts are sufficiently set forth in the following judgments, which were delivered by the Court (1) :—

Baboo *Pran Nath Pundit*, for Petitioner.

JACKSON, *J.* JACKSON, *J.* :—

The appellant before us preferred a charge of theft and housebreaking at a Police Station against two persons named Limgut and Bal Gobind. The Police Officer in charge of the Thannah made his enquiry and reported to the Magistrate that the case was false. But the complainant was not satisfied, and some time after, appeared before the Magistrate and requested that a further enquiry might be made. Upon that the Magistrate desired that the petition should be laid before him along with the papers in the Police enquiry. Later on, having compared the papers in question with the petition, he directed that the case should be struck off, and that proceedings should be taken against the com-

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plainant Biyogi Bhagut, firstly, under section 182 of the Indian Penal Code.

Proceedings were accordingly taken, and ultimately he was committed for trial and was convicted by the Sessions Judge, differing from the assessors, of an offence under section 211, and for this offence imprisoned for five years—a very severe sentence no doubt.

The objection has been taken before us for the first time on appeal that these proceedings are bad in law, because the Magistrate, having the appellant's complaint before him, dismissed it without taking down his examination in writing and making enquiry into it, and it is contended that, unless such enquiry had been made and terminated formally in favour of the accused person, no proceedings under section 211 could be taken.

There are, I admit, several reported cases in which various learned Judges of this Court have expressed opinions more or less in agreement with this contention. I myself do not concur in all these opinions, and as to some of them I am precluded by the terms in which they are expressed from attaching very great weight to them, because in some of these cases the opinion is not expressed very decidedly, and in others the decision has been given with reference to the particular facts of the case before the Court.

It appears to me that, so far as the positive provisions of the Code of Criminal Procedure go, the complainant, on appearing before the Magistrate, is entitled to demand that his examination should be taken and reduced into writing. But I conceive that the Magistrate, having examined the complainant, is authorized, by section 146, if he sees cause to distrust the truth of the complaint, to "postpone the issuing of process or compelling the attendance of the person complained against, and to direct a previous enquiry or investigation to be made into the truth of the complaint;" and if, as the result of such previous enquiry, it appears to the Magistrate that there is no sufficient ground for proceeding, he may dismiss the complaint, and thereupon, so far as the complainant is concerned, the complaint is absolutely at an end; and I should say, thereupon proceedings, under section 182 and section 211, may be directed or sanctioned. I am aware of no warrant for laying it down that in such a case, before sanctioning proceedings under section 211, the Magistrate is bound to hear

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witnesses in support of the accusation, in order to ascertain whether the complaint is true or unfounded. The appellant before us, therefore, is, in my view, borne out in saying that the Magistrate ought to have first examined him, and so far there has been a formal defect in the proceedings. Now, the way in which such a defect may be made use of at the trial, on behalf of the accused is, by alleging that he has been prejudiced by it. No such allegation appears to have been made at the trial, and it has been, for the first time, brought before us on appeal. I myself should not be very much inclined to give weight to this objection, but my brother MCDONELL thinks it worth something, and the opinion is borne out by the rulings to which I have alluded. Of course, if, as the result of further proceedings, the prisoner finds himself in a worse position than he is now in, and if he should choose to add to the offence of making a false complaint, that of giving false evidence on oath, it is entirely at his option to do so. Therefore, in deference to the opinion of my learned brother, and, in some degree, to the rulings that I have mentioned, I think it right to quash the proceedings in this trial, and direct that the Magistrate should re-open the enquiry into the charge of theft and burglary, first examining the complainant. Then if, upon further enquiry, and after examining the complainant, the Magistrate sees no reason to proceed in the matter of the complaint, or if, after full enquiry, the falsehood of the charge is clearly made out, the appellant will be open to proceedings against him under section 211 as before, or under any other section of the Code which may apply; and it appears to me, the Magistrate should require him to give recognizance to attend and prosecute the charge of theft and burglary.

MCDONELL, *J.* MCDONELL, *J.* :—

I consider that the accused was materially prejudiced by the way in which the proceedings were conducted. The Magistrate, before he took proceedings under section 211, I. P. C., should have taken down the examination of the complainant in writing, and should have made enquiry into it; and I am of opinion that the Magistrate would have used a wise discretion if he had examined the witnesses named by the complainant before instituting proceedings against him.

[CRIMINAL REFERENCE.]

THE EMPRESS. . . . . 1879 *Feb.* 19*th.*

AND No. 53 of 1879.

MUNNOO PANIOLI. . . . . .

Code of Criminal Procedure (Act X of 1872), sections 122 and 346—Confession unattested inadmissible—Secondary evidence to prove unattested confession.

A prisoner charged with murder confessed his guilt before the Magistrate, who recorded the confession under section 122 of the Code of Criminal Procedure, but omitted to append to the record the proper certificate, or obtain the attestation of the accused by his signature or mark, as required by section 346. The prisoner was finally committed to the Sessions Court for trial. *Held*, that the omissions could not be rectified under any authority contained in the last clause of section 346 by taking the evidence of the recording officer that the prisoner duly made the statement recorded, and that the confession was not admissible in evidence.

Reg. vs. *Rai Raiton*, 10 Bom. H. C. R., 166, followed.

REFERENCE under section 263 of the Code of Criminal Procedure by the Officiating Sessions Judge of Patna.

The circumstances out of which this reference arose were these :—

The prisoner was arrested on the 16th November 1878, on a charge of murder, and early on the following morning taken by the Police before the Deputy Magistrate, who at the time happened to be outside the division under his charge. There the prisoner made a full confession, and this confession the Magistrate recorded, attaching to the record the certificate required by section 122 of the Criminal Procedure Code. The confession was not attested by the mark or signature of the prisoner. On his return to his own district, the Magistrate took up the case, and having conducted the preliminary inquiry, examined the prisoner according to the provisions laid down by section 346.

At this examination, which took place on the 20th, the prisoner in answer to a question again stated he was guilty of the offence charged. This statement having been duly recorded, the Magis-

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trate thereto appended the necessary certificate under section 346, the prisoner himself attesting the certificate. The result was, that the accused was finally committed to the Court of Sessions.

When the case came on for trial, the Sessions Judge saw no reason to suppose that the confession made on the 17th November was otherwise than truly and voluntarily made, and upon that confession considered that the accused ought to be found guilty of the murder charged, two of the five jurors agreeing with him. At the trial, however, it was objected, on the authority of the case of *Rai Raiton*, reported in 10 Bom. H. C. R., 166, that this confession was defective as not having the proper certificate, and in not being signed or attested by the mark of the prisoner. Having a doubt as to whether the case cited should be followed, and being of opinion that if it were taken as an authority in the matter, the prisoner must be acquitted, the Judge referred the matter to the High Court.

The terms of the reference were as follows :—

The prisoner made a full confession before the Deputy Magistrate, Mr. J. White, and it seems to me that there is not the slightest reason for supposing that the confession was otherwise than truly and voluntarily made Two of the jurors concurred with me and gave a very good reason for their opinion. Three of the jurors acquitted the prisoner, but the reason given by them for so doing is purely conjectural. I cannot account for their verdict except by the supposition that they were averse to finding the prisoner guilty of a crime, the punishment for which is death, for there were no extenuating circumstances of any kind.

It is only fair to the prisoner to mention that his counsel raised an important legal objection which is undoubtedly supported by a decision of the Bombay High Court. This Court over-ruled the objection, on the ground stated in page 3 of the Sessions Record. It was of opinion that sections 346 and 122 should be read together, and that secondary evidence was admissible under section 346, to cure undoubted irregularities in the manner in which the confession was recorded. Prisoner did not affix his mark ; the confession, though detailed, was not recorded in the vernacular, and there was no certificate under section 346, but only under section 122. It is clear if the ruling of the Bombay High Court is to be followed, secondary evidence was not admissible, and prisoner is entitled to an acquittal.

The prisoner has been remanded to jail, pending the receipt of final order from the High Court.

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There was, besides the evidence already mentioned, considerable circumstantial evidence against the accused.

O'Kinealy, for the Prosecution.

Baboo *Amarendro Nath Chatterjee*, for the Accused.

Judgment.

The following judgments were delivered by the High Court (1) :—

MORRIS, *J.* :— MORRIS, *J.*

The confession made by the prisoner on the 17th November 1878, must, I think, be treated as a confession recorded under the provisions of section 122 of the Criminal Procedure Code. The prisoner was arrested by the Police on the afternoon of the 16th, and carried early the next morning before the Deputy Magistrate, Mr. White, who was then at a place, Bankipore, outside the limits of the division of which he had charge. Mr. White recorded the prisoner's confession and attached to it the certificate required by section 122. It is clear from this that Mr. White considered himself to be acting under the terms of that section. Subsequently, Mr. White returned to Barrh within the limits of his own division; and, having power to do so, took up the case against the prisoner, conducted the preliminary enquiry, examined the prisoner as prescribed by section 346, and, finally, on the same date, the 20th November, committed him for trial before the Court of Session.

The confession after 17th November is undoubtedly defective, inasmuch as it does not bear the proper certificate, and it is not signed or attested by the mark of the prisoner. In these respects the confession was not taken in the manner provided in section 346, as prescribed by section 122. The question, therefore, arises whether these omissions can be rectified under the authority contained in the last clause of section 346, by taking the evidence of the recording officer, that the prisoner duly made the statement recorded. As at present advised, I think I ought to follow the ruling of the Full Bench of the Bombay Court on this point as given in the case of *Rai Raiton*, 10 Bom. H. C. R., 166, and hold that the imperfect record of the confession taken under the terms of

(1) MORRIS and WHITE, *J.J.*

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section 122 cannot be repaired by secondary evidence. The special and express provision made to meet the case of an imperfect record of examination of a prisoner in the course of a preliminary enquiry cannot, in my opinion, be made applicable to the case of an imperfect record of a confession made before any Magistrate whilst the prisoner is still in the hands of the Police, simply because such confession has to be taken in the manner provided in section 346. In this view, therefore, the confession of the 17th November is not admissible in evidence, and must be excluded from consideration altogether.

It remains to consider whether, setting this confession aside, there is sufficient evidence on the record to convict the prisoner. There is no doubt that on the 20th November, that is, on the fifth day after the murder, the prisoner being charged with the murder of the woman Bajya, and asked whether he was guilty or not, answered that he was guilty. This examination of his was duly recorded by the Committing Magistrate in accordance with the provisions of section 346, and the Committing Magistrate, who was examined by the Court of Session, has stated on oath that the prisoner was fully aware of the import of his answer. This admission of guilt, in regard to the voluntariness of which there can be no doubt, for the evidence of Mr White and all the circumstances of the case show that no pressure was exercised, is alone sufficient to justify a conviction. But independently, there is evidence of a reliable character to prove that the prisoner who was one of the lovers of the woman Bajya was jealous of her and quarrelled with her, and was the last person who was seen in her company. Two witnesses saw him with Bajya on the evening of the 15th November, walking in the direction of the garden in which she was found the next day lying murdered. One of these witnesses testified to the prisoner wearing a cap at the time, and a cap similar to the one worn by the prisoner was found stained with blood close to the body of the murdered woman. It is not proved that this particular cap is the prisoner's property, but this item of evidence is important, as showing that the murderer was in all probability one of a cap wearing class. Then when we add to this that the prisoner, so far from denying that he was in the company of Bajya on the evening

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of the 15th, or explaining the circumstances under which he parted with her, frankly admits five days after before the Magistrate that he is guilty of the murder, there can, I think, be no reasonable doubt in the matter. I, therefore, concur in the view taken by the Sessions Judge and convict the prisoner.

There are no mitigating circumstances apparent in the case. On the contrary the murder was a cold-blooded and determined one, and I therefore think that sentence of death should be passed on the prisoner. We accordingly direct that the prisoner be hanged by the neck till he be dead.

WHITE, *J.*:—

WHITE, *J.*

I am of the same opinion. I agree that the statement made by the prisoner on the 17th November, and which is alleged to amount to a confession, is inadmissible in evidence. It was clearly taken under 122nd section of the Criminal Procedure Code. The prisoner was brought before Mr. White, simply for the purpose of having his alleged confession recorded, and there are no grounds for saying that, when Mr. White took down the prisoner's statement, he was examining the prisoner in the course of a preliminary enquiry, or that he intended to do so. The circumstance that Mr. White was also the committing Magistrate, furnishes no reason in my opinion why, upon Mr. White's proceedings on the 17th of November, a construction should be put which is contradicted by the facts. The alleged confession of the 17th November is defective for the reasons stated by my brother MORRIS, and upon the authority of the case in 10 Bom. H. C. R., the defects cannot be remedied by examining Mr. White.

We are not at liberty, therefore, to look at the alleged confession of the 17th of November. It appears to me, however, that independently and irrespective of it, there is no reasonable doubt upon the evidence that the prisoner is guilty of the offence with which he is charged. On the 20th November after the witnesses for the prosecution had been examined, and before the committal of the prisoner, the charge was read over to him by Mr. White. It stated in detail the name of the murdered person, the date of the murder, and the mode in which the murder was supposed to have been perpetrated, and the prisoner, in answer to the question

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whether he was guilty of the offence, replied that he was guilty of the offence. To this statement the Magistrate appends the necessary certificate under section 346, and the prisoner has also put his attestation, thereby signifying his assent to the correctness of the statement.

A further question was put to the prisoner "whether he intended to call any witnesses to prove his innocence," and he answered that he had some witnesses, and named two. It is objected that this further question and answer must be considered as modifying his previous reply. I am unable to see that they have that effect. The further question was a formal one, and the answer showing an intention on the part of the prisoner to call witnesses is not inconsistent with the confession of his guilt. His object may have been to produce witnesses for the purpose of mitigating the sentence which the Court might think fit to pass upon him. But whatever his object was, he called no witnesses, either before he was committed for trial, or when on his trial before the Sessions Judge.

The prisoner having made the statement which he did on the 20th of November, it remains to be considered whether the statement was made voluntarily and without pressure, and whether it was a true statement. The evidence has been read to us *in extenso*, and there is no trace upon it of any pressure having been put upon the prisoner by any person in authority, or by any other person either before or at the time when the statement was made; and the circumstances under which the statement was made are in favor of the conclusion that the statement is voluntary. Then is the statement true? Looking at the evidence adduced by the prosecution, it appears to me that there can be no reasonable doubt on this point. The prisoner was proved to have been in the company of the deceased, late in the evening of the night previous to the discovery of the murder, and to have been the last person seen with her when she was last seen alive. It is also proved that he had a subsisting quarrel with the deceased; that she had been originally in his keeping, but had ceased to be so about six months previous to the occurrence; and that she had two other lovers whom she preferred to the prisoner; that these matters were the subject of disputes between the prisoner and the

deceased, and that shortly before the occurrence he had exhibited, in connexion with them, angry feelings towards her and jealousy.

I may also allude to another piece of evidence which is this,—that the Magistrate, who took down the inadmissible statement on the 17th of November, deposes that, after he had done so, he was struck with the apparent levity of the conduct of the prisoner in the face of the serious charge brought against him, and accordingly observed it to the prisoner in the following way:—"Do you know what you have done? It is a very serious business." To which the prisoner replied, "I know what I have done; it is a matter of fate or *takdir*. I shall be hanged or transported.

It is true that in this case three, out of a Jury of five, have acquitted the prisoner, but they do so upon a ground which appears to me to be without foundation when the evidence is examined. The ground is, that the confession of the prisoner might have been suggested by the Police. Now, upon that ground, so far as it applies to the statement of the prisoner, which was made on the 17th, it is unnecessary to make any remark, as we have held that statement to be inadmissible. But with regard to the confession of the 20th, I think there is not the least reason for supposing that it was suggested by the Police. On the other hand, it is to be remembered that two of the Jury are of a contrary opinion to the majority of their brethren, and that the presiding Judge agrees with those two.

On the whole it appears to me to be made out beyond a reasonable doubt that the prisoner is guilty of murdering the deceased.

I also concur with my brother MORRIS that we must pass upon the prisoner the usual sentence which the law prescribes for murder. The evidence shows that the prisoner, under the influence of vindictive feelings against the deceased, decoyed her from her house about night-fall under pretence that she would be absent only for a short time, and that when he got her alone in a garden at some distance from her house, he murdered her under circumstances of great brutality. The medical evidence shows that he must have been a strong man of a most determined character, and have had a settled and inflexible purpose to destroy his victim. The Doctor says that the deceased was a young woman of 25 years of age, and in the full vigour of womanhood, and that she

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WHITE, J.

appears to have been throttled by the pressure of the hand; and that in order to produce death by that means and to overcome the struggles of the deceased, great force must have been used by the prisoner, and the throat of the deceased must have been firmly and fiercely held for a long time. According to the Penal Code, we are bound in murder to pass the extreme sentence of the law, unless there are reasons why a lesser sentence should be passed, in which case the reasons must be recorded. It appears to me, on reading the evidence, that there are no extenuating circumstances in the present case which would justify us in reducing the punishment.

[CIVIL APPELLATE JURISDICTION.]

J. C. PANIOTY . . . . . (DEFENDANT) APPELLANT ; AND DWARKA MOHUN DASS . (PLAINTIFF) RESPONDENT.

1879 *Feby. 25th.*

No. 276 of 1877.

***Hundi, Liability of Accommodation Acceptor of—Surety—Contract Act, section* 128.**

In a suit against the acceptor of a Hundi, the defendant contended that, as he had accepted the Hundi for the accommodation only of a third person, he was liable only as surety, and the plaintiff therefore could not proceed against him until he had exhausted all his remedies against the principal. *Held*, that the liability of a surety being under the Indian Contract Act co-extensive, unless there is some contrary agreement with that of his principal, it was not necessary for the plaintiff to have first exhausted his remedy against the principal.

Totakat Shangunni Thenon vs. *Kursungal Kaku Varid*, 4 Mad. H. C., 190; *Luchhman Joharimal* vs. *Bapu Khandu*, 6 Bomb. H. C., 241, cited.

REGULAR APPEAL from a decision of the Judge of Dacca.

Baboo *Guru Doss Banerjee*, for the Appellant.

Baboo *Lall Mohun Doss*, and Baboo *Bhoobun Mohun Doss*, for the Respondent.

The facts are sufficiently set forth in the following judgment of the High Court, (1) which was delivered by

JACKSON, *J.* :— JACKSON, *J.*

The plaintiff in this case sued upon a Hundi drawn by the first defendant, Panioty, for Rs. 5,000 on the third defendant N. P. Pogose, since dead, in favour of the second defendant P. N. Pogose. This Hundi was drawn in the manner described on account of an apprehended failure to pay the amount due on a previous Hundi drawn by the defendant No. 3 upon the defendant No. 1, which Hundi had been transferred to the plaintiff.

The Hundi, in respect of which this suit has been brought, was lost in transit to Calcutta by the Post. The loss was

(1) JACKSON and MCDONELL, *J.J.*

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advertised, and notice, verbal and written, was served both for a duplicate of the Hundi and for payment, but the defendants ultimately refused to grant a fresh Hundi, or pay the debt although they acknowledged it.

Judgment.

JACKSON, J.

The Court below discharged the defendant No. 2, the third defendant is dead, and his estate is in the hands of the Official Trustee, who appeared and was discharged, and judgment was given against the third defendant Panioty, who appeals.

The grounds of appeal urged before us are, firstly, that this appellant's signature and the making of the Hundi by him are not proved. But this fact is positively sworn to by the plaintiff's agent and co-partner, Audhor Chunder Dass, whose evidence is at page 6 of the paper book. He positively swears that Panioty signed the Hundi, and also that, upon intimation of the loss of that Hundi, he voluntarily agreed to give a fresh one, and the appellant assigns no reason whatever why we should disbelieve this witness. He only alleged before us certain circumstances which he conceives are incompatible with the truth of the witness's statement. Those circumstances are, firstly, that the original Hundi is still in the plaintiff's hand, he having filed it in the present suit, whereas, if the plaintiff's allegation were true, that Hundi ought to have come back to the person who gave it. Secondly, the letter, which was alleged to have been sent to Calcutta, is not registered.

Now, these are circumstances, both of which are capable of explanation, and of which explanation has been given, and we think they are not sufficient to invalidate the credit of the witness. But what is more important still is, that if we are to accept the case for the appellant, then that which is set up for the plaintiff is an absolute and audacious falsehood, and we should expect to find Mr. Panioty coming into Court and swearing that he had never signed the second Hundi. Mr. Panioty has not put himself into the witness-box at all. That being so, the testimony of the agent being entirely unrebutted, we feel bound to accept it, as the Judge of the Court below who saw the witness thought right to accept it.

Secondly, it is contended that Panioty, having received no consideration, being a mere accommodation acceptor, he was only liable as surety. Upon that it was sought to show that the

plaintiff having allowed time to the Pogoses that altered the position of the surety and in fact released him from all liability.

Now, this is not a ground taken in the memorandum of appeal, and we thought it would not be fair to the plaintiff to allow this point to be raised before us as the evidence stands.

Then it is contended that, admitting Panioty to have been a mere surety, the Court ought not to have allowed the plaintiff to proceed against him until all possible remedies against the principal had been exhausted.

But no authority has been shown for this contention. The general rule of the Indian Contract Act is, that the liability of the surety is co-extensive with that of the principal, unless there is some contrary agreement, and there is express authority against this view to be found in 4 Mad. H. C. R., page 190, 6 Bom. H. C. R., page 241, Appellate Civil Jurisdiction. There might possibly be circumstances under which the Court might be induced to say that the judgment being given against both principal and surety, the execution-creditor ought to execute his decree first against the principal, but the present case is not such a case, because it is manifest that now, except as against Panioty, the plaintiff really has no effectual remedy at all. Lastly, it is contended that the suit ought to have been dismissed as against Panioty, because no offer of indemnity had been made.

Now, that is a rule of English law which it is not shown has been extended in any form, either by custom or otherwise, to the Mofussil in India. No doubt if it appeared to the Court that by reason of omission to offer indemnity, or by reason of the suit being brought as it has been, the defendant had been exposed to any risk, the Court might either dismiss the suit or take measures for the defendant's protection as it thought fit. But in this case the evidence shows that the defendant has been exposed to no risk at all. Under these circumstances, we see no reason to apply to the defendant in this case, who is a person of business at Dacca—a rule which is not shown to have been extended to the Mofussil in India, and is found only in the English Courts.

We affirm the judgment of the Court below and dismiss the appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

1879 *Feby. 25th.*

No. 329 of 1877.

SRI NARAIN BAGCHI (DEFENDANT) . . . APPELLANT;

AND

PATRICK SMITH (PLAINTIFF) . . . . . RESPONDENT.

Regulation VIII of 1819, *Effect of sale under, being set aside—Right of former holders of under-tenures to possession, after irregular sale avoiding their tenures has been set aside.*

Plaintiff, whose *chahar* putni had been avoided along with the intermediate tenures by the sale of the putni under Regulation VIII of 1819, in order not to lose possession of the land, took an entirely new dur-putni from the purchaser at such sale of the putni. Thereupon the L. M. Bank, in execution of a mortgage decree which it held against him, sold this dur-putni, and the defendant became the purchaser. Subsequently the sale of the putni having been set aside, the putni, the intermediate tenures, and the plaintiff's *chahar* putni came again into force, and the plaintiff brought a suit against the defendant to recover possession as *chahar* putnidar. The defendant contended that, before plaintiff could recover possession, he must refund the amount paid by way of purchase-money by defendant at the execution sale of the dur-putni which had gone in part satisfaction of plaintiff's mortgaged debt. *Held*, that plaintiff was absolutely entitled to possession, the payment by the defendant being a mere voluntary payment which plaintiff was in no way bound to recognize.

Ram Tuhul Singh vs. *Biseswar Lall Sahoo*, L. R., 2 Ind Ap., 143, quoted.

REGULAR APPEAL from a decision of the Officiating Subordinate Judge of Nuddea.

Baboo *Mohinee Mohun Roy*, and Baboo *Kissory Mohun Roy*, for the Appellant.

Evans, and Baboo *Lall Mohun Dass*, for the Respondent.

The facts are sufficiently set forth in the judgment of the High Court (1), which was as follows :—

We think the judgment of the Court below is quite right.

The plaintiffs sought to recover possession of this land which they held under a chahar putni.

(1) JACKSON and MCDONELL, *J.J.*

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Judgment.

This chahar putni had shared the fate of its superior holdings, the se-putni, dur-putni and putni, which were improperly and irregularly sold by the Collector under Regulation VIII of 1819.

The plaintiffs, in order not to lose their possession of the land, took an entirely new dur-putni under the auction-purchaser of the putni itself, and thereupon the Land Mortgage Bank, having a decree against the plaintiffs, took out execution and sold the entire turuff, as I understand, within which this dur-putni was comprised, and the defendant was the purchaser of it.

Now, the sale of the putni which carried with it the fall of the plaintiffs' chahar putni, as well as the intermediate tenures, has been set aside by a decree of the Civil Court, and thereupon all these tenures came again into being and force, and the plaintiffs now sought to recover possession as chahar putnidars.

The ground on which the defendant, now on appeal before us, seeks to resist the claim of the plaintiffs is, that by the application of a portion of the purchase-money paid in respect of the entire turuff which afforded satisfaction in part of the plaintiffs' mortgage debt, he has conferred a benefit upon the plaintiffs, and consequently the plaintiffs, before they can recover possession of the chahar putni, ought to be put on terms and compelled to repay them a certain portion of the purchase-money.

It appears to us that the defendant is not in that position. That which he purchased was not the chahar putni, nor did the Land Mortgage Bank proceed against the chahar putni which had been mortgaged to it. The bank availed itself of its right to execute its decree generally, and sold the dur-putni and by name the dur-putni granted by Tara Chand Biswas. The defendant, in purchasing that along with other parts of turuff Ramessurpore, took his chance. He has not, in fact, conferred any benefit upon the plaintiffs in respect of saving this particular property from sale. On the contrary there is nothing, as far as we can see, to prevent the Land Mortgage Bank from taking this chahar putni in execution at any time, and even if he had, it appears to us, that this was merely a voluntary payment. It was not a payment such as the plaintiffs were under any obligation, express or implied, to recognize. That being so, the case comes within the

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observations of the Judicial Committee in the case reported in L. R., 2 Indian Appeals, 131. The observations are in page 143. Their Lordships say :—"But even if this were true, it is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises." It was a voluntary payment. In fact, the greatest difficulty would arise in apportioning, out of the whole sum, the proper amount which had been set against this particular property. He bought an entire turuff, and by causes, no doubt beyond his control, part has gone out of his hands. The appeal must be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

March 25th.

No. 265 of 1878.

DOOLI CHAND AND OTHERS (DECREE-HOLDERS), APPELLANTS;

AND

NIRBAN SINGH . . . . (JUDGMENT-DEBTOR), RESPONDENT

Mortgage—Mortgagor, Defective title of—Equitable rights of Mortgagee.

B having, in 1863, executed a mortgage of a 14-annas share of certain lands to A, who was the owner of a 2-annas share in the same, it turned out that B was not in a position to have mortgaged more than 12-annas. In 1865, A sold his 2-annas share to B. Subsequently B's 12-annas share, which was subject to the mortgage, was sold in execution of a decree held by A against him. A, having now sued upon the mortgage of 1863 and obtained a decree, sought to execute this decree by sale of the 2-annas share which he had since the mortgage sold to B.

Held, that B's contract having been to hold 14 annas subject to the mortgage, A had an equitable right to demand that the 2-annas share on passing to B, should be subject to the mortgage, and that accordingly such 2-annas share was saleable in execution of A's decree.

APPEAL from an order passed by the Subordinate Judge of Gya.

In this case the facts are these :—

On the 24th October 1863 the judgment-debtor executed a mortgage to the plaintiffs of a 14-annas share in Mouza Muchgawan, the plaintiffs themselves being the owners of the remaining 2-annas share of the mouzah. At the time of this mort-

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Judgment.

gage it appears that a suit was pending, and that in this suit one Ajoodhia Pershad obtained an order of the High Court, under which 2 annas, of the 14-annas share mortgaged, were declared to be his, so that the security which the mortgagor contracted under the mortgage of October 1863 to give was reduced to the extent of a 2-anna share. Subsequently the remaining 12-annas share was sold in execution of a decree, and purchased by the plaintiffs themselves, who had, prior to this sale in execution, sold in 1865 to the defendant the 2-annas share of which they had been the actual owners at the date of the mortgage.

In April 1876, the plaintiffs sued upon the mortgage, and having obtained a decree, sought to execute it against the 2-annas share sold by them to the judgment-debtor, and now in his possession. The judgment-debtor objected to execution proceeding, urging that the order in the decree was to the effect that "the *mortgaged property* be sold in satisfaction of the decretal money," and that this 2-annas share was not, and never had been, subject to the mortgage.

The Subordinate Judge was of opinion that the 2-annas share was not saleable in execution of the decree, and upheld the objection of the judgment-debtor. Against this order the decree-holders appealed.

Baboo *Kally Mohun Doss*, and Baboo *Nil Madhub Sen*, for the Appellants.

Baboo *Lall Mohun Doss*, for the Respondent.

The following judgment of the Court (1) was delivered by

AINSLIE, *J.* :—

AINSLIE, *J.*

The decree-holder obtained a decree on the 22nd February 1872 on a bond, dated the 24th October 1863, by which (with other property) 14-annas of Mouzah Muchgawan was mortgaged as security for a debt. It is admitted that, in addition to the 14-annas held by the decree-holder as mortgagee, he had obtained the remaining 2-annas of Mouzah Muchgawan under a conveyance from the judgment-debtors. So that at the date of the mortgage transaction he was proprietor of 2-annas and mortgagee of the remainder.

(1) AINSLIE and BROUGHTON, *JJ.*

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Judgment.

AINSLIE, J.

But there was a suit pending in which one Ajoodhia Pershad obtained a decree declaring his ownership in respect of 2-annas of the village. After this decree the position of the parties was this, that Ajoodhia Pershad was owner of 2-annas, the decree-holder was owner of 2-annas, and the judgment-debtors were owner of 12-annas, which were under mortgage to the decree-holder.

Then on the 20th June 1865, the decree-holder sold a 2-annas share to the judgment-debtor. This 2-annas share of course must be that in which he had a proprietary interest. We, therefore, again find the judgment-debtors in the position of proprietors of a 14-annas share of Mouzah Muchgawan.

There was another decree held by the same decree-holder against the same debtors in execution of which 12 annas of Mouzah Muchgawan were brought to sale and purchased by the decree-holder. The decree-holder now seeks in execution of the decree of 1872 to sell the remaining 2-annas which is in the possession of the debtors as a portion of the mortgaged property.

The contention of the debtors has been that this 2 annas is altogether distinct from the 14-annas mortgaged, and that they are entitled to hold it free of the mortgage.

There can be no doubt that, at the date of the mortgage, there was a 2-annas share held by the decree-holder, which has subsequently passed to the judgment-debtors, and which obviously could not be subject to the mortgage at the date thereof. The contract of the judgment-debtor was to hold 14-annas subject to a mortgage for the repayment of the debt due to the appellant. So long as he had only a 12-annas share in his possession the mortgage security was of necessity reduced to that amount; but if at any time he became owner of 14-annas, the creditor had an equitable right to demand that that 14-annas should be subject to the mortgage. This principle has been distinctly recognized in the Specific Relief Act; and it appears to us that there can be no doubt that the decree-holder is equitably entitled to have security, as far as it is possible, for the debtor to give it up to the extent of the 14-annas for which he contracted.

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Judgment.

AINSLIE, *J.*

We therefore think that the two annas share in respect of which there has been a dispute in the Court below is properly saleable in execution of the appellants' decree, if, on taking an account of that which has been realized, it is found that there is an outstanding debt.

It is contended that this appeal will not lie; and a case was brought to our notice decided by a Division Bench of this Court —(Miscellaneous Regular Appeal No. 331 of 1878), the decision in which is based upon a ruling of the Bombay High Court in the Indian Law Reports, Bombay Series, Vol. I, page 553. It is, however, unnecessary for us to consider those cases, because we think that when the proceedings are examined, the contention of the appellant must be allowed that these proceedings must be taken as pending from before the date on which the new Code of Civil Procedure came into force; and therefore under the Full Bench decision of this Court all rights of appeal are preserved.

It appears that on the 26th April 1876, the decree-holders made an application for executing their decree by sale of fourteen annas of Muchgawan, being the property mortgaged to them. Subsequently, on the 20th November of the same year, they put in a petition in which they recited that the property mentioned in their inventory had already been converted into money under a sale held in another suit, and asked to have the surplus sale proceeds. Five days later, *i. e.*, on the 25th November, they put in a formal application in the form prescribed in section 212 of the Code of 1859, asking for the payment to them of those surplus sale proceeds.

It is evident that the intention was to proceed against the same property that had been previously mentioned in the petition of April. The first proceedings were dropped, and the application was renewed in this form merely as a consequence of the change in form of the property.

On the application of November 1876, the judgment-debtors pleaded limitation, and the case was then taken up to the High Court. Eventually, on the 28th June, 1877, the debtor's plea of limitation was over-ruled, and the case was remanded to be proceeded with. This was followed by the application of the 6th of

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April 1878 for a specific order for the sale of the two annas share which had not been converted into money.

Looking at the nature of these several applications, we think that we ought to hold that the whole of them are so connected together, that they form one transaction; and that therefore the proceedings in the case ought to be taken as pending from 1876.

The appeal must therefore be allowed with costs.

[CIVIL APPELLATE JURISDICTION.]

March 27th. No. 247 of 1878.

ADDOYTO CHUNDER DASS. . . . . APPELLANT.

AND

WOOJAN BEEBEE. . . . . RESPONDENT.

Illegitimate child—Maintenance.

Where a suit was brought against a Hindu by a woman who was a Mahomedan and the wife of a Mahomedan, for maintenance of her illegitimate child of which she alleged the defendant to be the father, it was held that such a suit would not lie.

APPEAL from an Appellate Order passed by the Subordinate Judge of Rungpore, reversing the order of the Moonsiff of Buddergunge.

Moonshee *Serajul Islam* for the Appellant.

Baboo *Bhyrub Chunder Banerjee*, for the Respondent.

The facts sufficiently appear from the judgments of the Court (1) which were as follows:—

MORRIS, *J.*

MORRIS, *J.*:—

This was a suit brought by a Mahomedan woman, one Woojan Beebee, wife of Jodu Nasaya, against a Hindu Addoyto Chunder Dass, by caste a Rajbunsi, for a declaration of right to recover Rs. 24 per annum for maintenance of a child begotten by him.

The first Court held that the suit would not lie, and dismissed the suit; but in appeal the lower Appellate Court was of

(1) MORRIS and WHITE, *J.J.*

opinion that the suit could be maintained, and remanded it to the lower Court for trial. Against this order the present appeal is preferred.

The ground taken by the lower Court is that, "under the Hindu Law even an illegitimate child is entitled to claim maintenance from his father, and I am not therefore prepared to think that the provisions of section 536 of Act X of 1872, can consistently deprive the remedy, which might otherwise be attained by recourse to a Civil Court."

It should be noticed that in the plaint the plaintiff states that she had recourse to the Magistrate under section 536 of the Criminal Procedure Code, and that the Magistrate disallowed maintenance on the ground that it had not been proved that the defendant was the father of the child. Without entering into the question whether the Civil Court has jurisdiction to determine a point which has already been settled by the Magistrate under section 536 as to the paternity of the child, I think that a suit, such as this is, will not lie. The rule of Hindu Law referred to is not applicable to the circumstances of this case. It differs entirely from the case of the offspring of a female servant by the head male member of a family being entitled to maintenance. This is a case of a Mahomedan woman, whose husband is still living, suing a man of a different race for maintenance on account of the offspring of their unlawful intercourse. In my opinion a suit of this kind cannot be maintained in a Civil Court.

Therefore, the order of remand of the lower Court will be set aside, and the order of the first Court restored with costs.

WHITE, *J.* :— WHITE, *J.*

This is a suit of an entirely novel character, being brought by a Mussulmani who describes herself as the wife of a living Mahomedan, against a Hindu whom she alleges to be father of a child of which she is the mother. The plaintiff seeks to recover from the defendant Rs. 2 a month as and for the maintenance of the child. The first Court has in substance held that the suit will not lie. The lower Appellate Court considers that it will lie, and has remanded the case to the first Court in order to try the issue whether the defendant is really the father of the child

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ADDOYTO CHUNDER DASS v. WOOJAN BEEBEE.

Judgment.

WHITE, *J.*

and, if so, whether he is liable to be sued by the plaintiff for maintenance for the child.

No authority has been cited, either based on English or on Hindu Law, shewing that a suit of this character will lie. On the other hand, decisions of this Court have been referred to by the pleader for the appellant which, though not directly in point, are adverse to the maintenance of such a suit.

I agree, therefore, with my brother MORRIS that in the present state of the authorities the first Court was right in holding that the suit was not maintainable, and that the order of remand made by the lower Appellate Court should be reversed.

[CIVIL APPELLATE JURISDICTION.]

March 27th.

No. 237 of 1878.

NAFER CHUNDER MUNDUL, DECREE-HOLDER . . . . . } APPELLANT;

AND

BAIKANTO NATH ROY AND ANOTHER, JUDGMENT-DEBTOR . . . . . } RESPONDENT.

Execution of decree by transferree of original decree-holder—Mortgage Decree, Execution of, by holder who has also purchased part of the mortgaged property.

A decree having been obtained upon a mortgage, against two judgment-debtors—the joint owners of a certain mehal which was subject to the mortgage, and which was declared by the Court to be subject to the decree, in the event of default being made in payment of the mortgage money, the 8-anna share of one of the debtors was, before execution had been taken out, sold at auction under Act VII (B.C.) of 1868 and purchased by the appellant. Subsequently the decree-holder having attempted to execute the decree against the share so purchased, the appellant, in order to protect the share which he had bought, purchased the decree himself and proceeded to execute it against the remaining share in the hands of the judgment-debtors.

Held, that the appellant as the transferree of the original decree-holder was entitled to execute the decree personally against the judgment-debtors, and also, in the event of their making default in paying the amount due under the decree, to proceed against the share of the mehal still in their hands; and, further, that if by reason of it being necessary to sell the remaining share of the judgment-debtors any equity should arise between them and the appellant to have the decre-

tal money distributed over the whole property mentioned by the decree, that equity must be enforced by an independent suit.

APPEAL from an order passed by the Second Subordinate Judge of Rajshahye.

Statement.

In this case Panchoo Mundul had obtained a decree against Baikanto Nath Roy and Ramtarun Roy, upon a mortgage which comprised their interest as joint owners of a certain mehal called Bangala Kundur. After the decree, but before proceedings in execution had been instituted, the rights and interest of Baikanto Nath, being an eight anna share in the mehal, were sold at auction under Act VII (B.C.) of 1868, at the instance of the Government and purchased by Nafer Mundul. Subsequently Panchoo Mundul having in execution of his decree attached that share of the mehal, Nafer Mundul preferred a claim to the attached lands on the ground of his purchase. The Subordinate Judge however rejected the claim, holding that the purchaser took the lands subject to the mortgage lien, and ordered the money covered by the decree to be realised from the property in his hands. Meanwhile, in order to protect the mehal from sale in execution Nafer Mundul purchased the decree benamee in the name of one Lukhey who proceeded forthwith to execute the decree so purchased against the remaining eight anna share in the hands of the judgment-debtors, but it was held on appeal upon objection taken by the judgment-debtors that execution could not proceed at the instance of the benamee purchaser. Whereupon Nufer Mundul himself applied for execution. The judgment-debtors objected that he had purchased subject to the mortgage lien, and further that as he had since purchased the decree the decree must be treated as satisfied.

The Subordinate Judge, before whom this case was heard, being of opinion that the objections taken were valid, ordered the execution proceedings to be struck off.

Against the order the decree-holder appealed to the High Court.

Baboo *Sreenath Dass*, and Baboo *Kali Churn Banerjee*, for the Appellant.

No one appeared for the Respondents.

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Judgment.

WHITE, *J.*

The following judgments were delivered by the Court (1) :—

WHITE, *J.* :—

The appellant in this case is the purchaser of a decree which was obtained by Panchoo Mundul against two defendants upon a mortgage bond. The decree directed the amount to be paid by the defendants, and in default of payment to be realized out of the mortgaged property. After the decree was made, but before any steps were taken to execute it, or the appellant became its purchaser, a portion of the mortgaged property, namely, a half share of Mehal Bangala, and which belonged to one of the defendants, was put up for sale by the Government, under Act VII (B.C.) of 1868, in consequence of the default of that defendant to pay certain money which the Government had lent to him under that Act. The appellant became the purchaser at that sale. The decree-holder, Panchoo Mundul, subsequently proceeded to execute his decree by attaching the property so bought by the appellant. The latter objected on the ground that as he had purchased at a Government sale, he was entitled to hold the property free of all encumbrances. His objection was overruled by the Court. The consequence was that the property in question became subject in his hands to the payment of the whole of the decretal amount. Such being the state of affairs, the appellant afterwards, and before any sale of the property attached was effected under the decree, purchased the decree, from Panchoo Mundul, for a considerable sum of money. This he did in the name of a benamdar called Lukhey. When the purchase was completed, he attempted in the first instance to execute the decree against the two defendants in the name of Lukhey. The Court, however, having become aware that Lukhey was merely a benamdar, declined to allow execution to issue at her instance and refused the application. And the order refusing that application has been upheld on appeal to this Court. The appellant then applied in his own name for execution, and he was met by an objection on the part of the defendants that the transaction which had taken place between him and Panchoo Mundul amounted to a satisfaction of the decree. And by the further objection that the

(1) MORRIS and WHITE, *J.J.*

effect of that transaction was to place him in the position of a judgment-debtor, who had purchased the decree and that the decree was therefore incapable of execution. When the facts are correctly stated, it is not easy to see how either of these views of the transaction could be taken. The lower Court, however, has adopted them, and allowed the objection of the defendants. The Subordinate Judge states his view in these words:—"If Nafer Chunder Mundul, that is, the appellant, had purchased the aforesaid Mouzah Bangala Kundur at an auction sale in satisfaction of the decree obtained by Panchooram Mundul, then the judgment-debtors would have certain amount of surplus left in their favour after the satisfaction of the whole of the amount covered by the decree of Panchooram Mundul. But as that mehal could not be sold by auction, and as the decree has been purchased by Nafer Chunder Mundul, it is presumed that Nafer Mundul has paid off the whole of the amount due under that decree, and that the decree has been satisfied. In order, however, to realize that portion of the decretal money which he (Nafer Mundul) is entitled to get from the two judgment-debtors, he, instead of taking out execution, was at liberty to bring a contribution suit or to attach and sell the whole of the Mehal Bangala Kundur. But as he hae not done so, he, Nafer Mundul, has, in my opinion, placed himself in the category of judgment-debtors according to the purport of the precedent reported in 15 W. R., 372, and as such, he is incompetent to carry on the execution case." It is not easy to follow the reasoning in this paragraph. The fact that the appellant anticipated a sale being made under the decree of the property which he had bought at the Government sale by purchasing the decree, affords no presumption that the appellant had paid off the amount of the decree, or that the same was satisfied. Nor has the appellant placed himself in the position of one of several judgment-debtors purchasing a decree, because he applied for execution of the decree instead of suing the defendants for contribution on attaching and selling the whole mehal of Bangala.

What the appellant has done is to purchase the decree, in order to protect the property which he bought at the Government sale from being sold under the decree.

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NAFER CHUNDER MUNDUL v. BAIKANTO NATH ROY.

Judgment.

WHITE, J.

The result of the purchase is not to make him a judgment-debtor or *quasi*-judgment-debtor, but to put him in the place of Panchoo Mundul. As Mundul's transferree he is entitled to execute the decree against the defendants personally, and also, in the event of their making default in paying the amount, to go against the remainder of the property mentioned in the decree. It may be that if the decretal money has to be realized by the sale of the last mentioned property, an equity may arise as between the appellant and defendants, to have the decretal money distributed over the whole of the property mentioned in the decree, and to have the share of the mehal bought by the appellant at the Government sale, contribute its proportionate part of decretal money. But if such an equity exists, I think it must be asserted in an independent suit. At all events the existence of such an equity, supposing it to exist, is no bar to appellant now proceeding against to execute the decree.

The respondents, who are the defendants in the suit, have not appeared, although notice has been served upon them. We must set aside the order of the lower Court, and direct execution of the decree to issue at the instance of the appellant Nafer Chunder Mundul.

The appeal will be allowed with costs.

MORRIS, J.

MORRIS, *J.*:—

I concur.

[ORIGINAL CIVIL JURISDICTION.]

TORITABHOOSUN BANERJEE ... ... PLAINTIFF;

AND

TARAPROSUNO BANERJEE AND ANOTHER ... DEFENDANTS.

1879
April 2nd.

No. 503 of 1877.

Parties—Partition Suit by brother—Joinder of Widows.

In a suit brought by the only son of one of the two widows of a deceased intestate for partition of the property left by him, against the sons of the other widow, the two widows not having been made parties it was *held*, that the suit, as framed, could not proceed.

THIS was a suit for partition of certain moveable and immoveable property left by one Dhurmodas Banerjee, who died intestate, leaving him surviving two widows, Anundmoye Dabee and Bindoobasinee Dabee, and three sons, Taraprosuno Banerjee and Kaliprosuno Banerjee, the sons of the first widow, and Toritabhoosun Banerjee, the only son of the second named widow.

The suit was brought by Toritabhoosun against his two brothers only, as defendants, neither the widows nor the plaintiff's grandmother, who was also alive, being made parties to the suit. Kaliprosuno being a lunatic was represented by his Committee. The other defendant, by his written statement, objected to the non-joinder of the widows, but at the hearing he appeared in person, and offered no objection to the prayer of the plaint.

Bonnaud, for the Plaintiff.

J. G. Apcar, for the Committee of the lunatic.

Bonnaud pointed out the fact that the widows of the deceased had not been joined in the suit, but submitted that, taking into consideration the circumstances of this case, it was unnecessary that they should be joined. The plaintiff here was an only son, and that being so, his mother was not, he contended, entitled to any share on partition from him. His client was entitled to a third of the immoveable property left by his father, Dhurmodass Banerjee, and he was not bound to make either his mother or the mother of the defendants, parties to the suit, inasmuch as they

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TORITA-BHOOSUN BANERJEE v. TARAPROSUNO BANERJEE.

Statement.

were not in his suit entitled to any share on partition. The plaintiff's mother had no right of succession so long as her son was alive; she was only entitled to maintenance out of her husband's estate and that from the share taken by her son.—Mayne's Hindu Law, p. 397; and Macnaghten on Hindu Law, p. 65, and the cases there cited.

With regard to the plaintiff's grandmother, she certainly should not have been made a party to the suit, inasmuch as she was sufficiently provided for during her lifetime by her husband, and also because, even if she had a claim to a share in the partition of Dhurmodass's property, her claim was now barred by limitation.

Then as to the mother of the defendants there was no necessity to make her a party to this suit, for she, not being the plaintiff's heir, was in no way interested in his share in the partition. It was only when partition was made by the brethren of the whole blood, after the demise of the father, and when the brothers did not intend to live together as an undivided and united family, that their mother was entitled to insist upon an equal share being given to her; because on partition by the brothers, there was a likelihood of the mother being deprived of the maintenance which she was entitled to receive out of her husband's estate.

If the defendants, who were brothers of the whole blood, had brought this suit for partition, they would have been compelled to make their mother a party to the suit, because she would have been entitled on partition to a share equal to that of her sons. But in the present case, the suit is brought by the half-brother of the defendants, who is entitled, independently of the widows of Dhurmadoss, to a third of his father's estate; and his mother would only be entitled to maintenance during his lifetime out of his share, and could not, according to the Hindu Law as obtaining in Bengal, demand a partition as against him.—Cowell's Hindu Law, p. 70.

The three cases cited by Macnaghten in his Considerations on Hindu Law, page 65, lay it down that where there is a partition after the father's death between several brothers, some of whom are by one wife, some by another, and either wife survives at the time of the partition, the property should be first divided among

all the brothers, and the widow should take an equal share with her son of the whole portion allotted to them.

[PONTIFEX, *J.*—In the case of *Colly Churn Mullick* vs. *Janoba Dossee*, 1 Ind. Jur. N. S., 284, Mr. Justice PHEAR doubted the propriety of these decisions. He was of opinion that a widow's right to a sufficient and suitable maintenance before partition was a charge upon the *whole* of her late husband's estate.]

But PHEAR, *J.*, affirmed these decisions, although he doubted their correctness, and so far they have not been authoritatively overruled. According to these cases, therefore, the plaintiff is entitled to have the property divided in the first instance equally between himself and his two brothers.

PONTIFEX, *J.*:—

PONTIFEX, *J.*

I think the property ought to be divided into four parts, the sons each to take one part and the widows one part between them. I cannot, however, make the order now, but I will give you leave to amend your plaint by adding such parties as you may be advised.

[ORIGINAL CIVIL JURISDICTION.]

1879 April 8th

GOSTO BEHARY PAL . . . . . .

AND

JOHUR LALL PAL . . . . . .

Practice—Evidence—Interrogatories.

A party wishing to use answers to interrogatories administered by him in a suit must put them in as part of his evidence.

IN this case the question arose at the hearing whether the plaintiff, at whose instance interrogatories had been administered to the defendant, if he wished to use the answers to the interrogatories, must put them in as part of his evidence, or might read so much only of them as he might think fit.

Bonnerjee and *Trevelyan*, for the Plaintiff.

Woodroffe, Jackson and *Hill*, for the Defendant.

Bonnerjee contended there was no settled practice as to the way in which interrogatories might be used. In the Old Supreme Court the practice was for the party administering the interrogatories to read so much of the answers as he thought fit. If interrogatories are now to be treated in the same way as commissions, they will form part of the record, and the whole will be evidence. Under section 147 of the Code, interrogatories are treated as part of the record. That section provides that the Court may frame issues from allegations made in the plaint or in the written statement, or in answer to interrogatories delivered in the suit.

WILSON, J. WILSON, *J.*:—

Answers to interrogatories are simply affidavits obtained in the way which the Code provides, and the party wishing to use them must put them in as part of his evidence.

[CIVIL APPELLATE JURISDICTION.]

SHEIKH MAHOMED ASSANOOLLAH CHOWDHRY AND OTHERS . . . . . } APPELLANTS;

AND

SHAMSHIR ALI AND ANOTHER . . . . RESPONDENTS.

1879 *March 13th.*

No. 1383 of 1878

Under-tenure, Suit to avoid—Act XI of 1859, *section* 37—*Act VIII (B.C.) of* 1865, *section* 16—*Resident and Hereditary Cultivator.*

A certain chur having been converted into two estates paying Government revenue, the plaintiffs became the purchasers of one of these estates at a sale for arrears of revenue and of a howla lease of the other at an auction sale for arrears of rent, and brought a suit in virtue of section 37 of Act XI of 1859 and section 16 of Act VIII (B.C.) of 1865, to avoid the tenures of the defendants who held in shikmee talookdaree and howladaree tenure, lands appertaining to both estates. The defendants admitted the alleged nature of their holdings, but claimed exemption from eviction, on the ground that their ancestor, more than 12 years before, had cleared and cultivated the land and built a house thereon, and that since his death they themselves had continued to cultivate the land and reside upon it. The lower Courts having found that the defendants were hereditary and resident cultivators, it was

Held that the defendants were entitled to the benefit of the proviso in section 16 of Act VIII (B.C.) of 1865, the words of that proviso being wide enough to embrace every resident and hereditary cultivator irrespective of his denomination.

APPEAL from an Appellate Decree passed by the Subordinate Judge of Noakhally, affirming the decree of the Moonsiff of Sundeep.

The facts are these:—A certain chur was converted into two estates paying Government revenue, the larger comprising 11 annas 17 gundas and 1 kara of the whole chur. The first of these estates was sold for arrears of revenue, and a howla right in the second for arrears of rent. The plaintiffs became the purchasers of the estate in the one case, and of the howla lease in the other, and now sought to avoid the under-tenures and to eject the defendants who held lands in the chur appertaining to both estates by shikmee talookdaree and howladaree tenure.

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SHEIKH MAHOMED ASSANOOLLAH CHOWDHRY v. SHAMSHIR ALI.

Judgment.

The defendants admitted that they held their lands as alleged in the plaint, but claimed a right of occupancy by reason of their ancestor having more than 12 years before held undisputed possession by building a house on one portion and cultivating the rest, and by their having themselves, since his death, held the lands in like manner.

Both lower Courts, upon the evidence, decided that it had been proved that the defendants were actually cultivating tenants resident upon their holdings, and, that that being so, they could not be ejected by the plaintiffs. Against this decision the plaintiffs preferred this appeal to the High Court.

Baboo *Aukhil Chunder Sen*, for the Appellant.
Baboo *Boykant Nath Dass*, for the Respondent.

The judgment of the Court, (1) after stating the facts, proceeded as follows :—

The question was thus raised in the Court of First Instance whether the defendants were in possession of the disputed land as intermediate tenants, and as such liable to eviction, and on appeal before the Subordinate Judge the issue raised was, whether or not the defendants had a right of occupancy?

The first Court found that the defendants' ancestor took the disputed land under howla settlement; that, more than 12 years ago he held possession by erecting a house on one portion, and cultivating the rest; and on his death the defendants held possession in the same way. The Court disbelieved the witnesses of the plaintiff, who asserted that the defendants have sub-let the lands, and held that whether the defendants were in enjoyment of the land as howladars or in any other capacity, they were actual cultivating tenants, and as such, having a right of occupancy, could not under any of the Sale Laws be evicted by an auction purchaser. On appeal, the lower Court confirmed this view, saying: "It has been borne out by the testimony of the witnesses for the defendants that their homestead is on a portion of the disputed land, and the remainder is cultivated by them. Such tenants cannot be turned out of their homes and holdings by any auction purchaser."

(1) WHITE and MORRIS, *J.J.*

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SHEIKH MAHOMED ASSANOOLLAH CHOWDHRY v. SHAMSHIR ALI.

Judgment.

It is urged in appeal before this Court that this judgment of both the lower Courts is wrong in law, inasmuch as the defendants are manifestly middlemen, holding an intermediate tenure and not ryots possessing a right of occupancy.

It seems to me clear both on the allegations of the defendants themselves and on the finding of the first Court, which has apparently been accepted without demur by the Subordinate Judge, that the defendants occupy the position of shikmee talookdars and howladars, and not that of ryots, consequently no right of occupancy attaches to them. It remains to be considered whether their position as tenants who have created a homestead and cultivate the land around it protect them from eviction.

The plaintiffs have dealt with this property not as two tenures which it really is, but as one tenure, consequently the defendants are entitled to any benefit which they may derive from the Act of 1859, or the Bengal Council's Act of 1865. Section 37 of the former Act contains the proviso that a purchaser under the Act, as described in this section, shall not be entitled to eject any ryot having a right of occupancy at a fixed rent or at a rent assessable according to fixed rules under the laws in force.

This provision is clearly inapplicable to the present defendants, who cannot be described as ryots having a right of occupancy. Turning, however, to section 16 of the (B.C.) Act VIII of 1865, we find that nothing contained in that section shall be held to entitle the purchaser to eject khudkasht ryots, or resident and hereditary cultivators, and the question arises whether the defendants do not answer to the description of resident and hereditary cultivators. The terms are certainly comprehensive enough, and appear to embrace every resident and hereditary cultivator irrespective of his particular denomination. It would seem as though the Legislature drew a distinction between khudkasht ryots, and resident and hereditary cultivators, though no doubt the former can be described as such, and that it strove to mitigate the severity of a sale law under which all under-tenures, the growth of the present tenure sold were swept away, by protecting from eviction all persons who actually reside on and cultivate the soil as their fathers or ancestors did before them. In this view, accepting the finding of both the lower Courts that the defendants

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are resident and hereditary cultivators, I think that they are entitled to the benefit of the proviso in section 16 of Act VIII of 1865 (B.C.), and that the Courts were right in refusing to give the plaintiffs khas possession of their land.

The appeal is dismissed with costs.

Judgment.

WHITE, *J.*:—

WHITE, *J.*

I agree that the appeal should be dismissed.

[CIVIL APPELLATE JURISDICTION.]

1878 *December 21st*

No. 1174 of 1878.

PROTAP CHUNDER ROY CHOWDHRY ... APPELLANT;

AND

JOGENDRO CHUNDER GHOSE AND ANOTHER, RESPONDENTS.

Intervenor—Suit for arrears of rent by person claiming to be landlord.

In a suit for arrears of rent brought by a person claiming to be landlord, a third person ought not to be allowed to intervene, and by setting up a superior claim to the landlord's title to raise as between himself and the original plaintiff an entirely distinct question between new parties.

APPEAL from an Appellate Decree passed by the Judge of the 24-Pergunnahs, reversing the decree of the Second Moonsiff of Satkhira.

In this case the plaintiff, Protab Chunder Roy Chowdhry, sued the defendant for arrears of rent in respect of certain lands held by him and for which he had, on 2nd Srabun 1283, executed a kabuliut to the plaintiff. In the plaint it was stated that the lands had been the mourasi jummah of one Judoonath Ghose, and that he having mortgaged them to the plaintiff, the latter had subsequently foreclosed the mortgage and obtained possession.

The defendant, who had already paid the rent claimed, to the zemindar, denied having executed the kabuliut, alleging moreover that the jummah held by Judoonath was not transferable, and that, therefore, the plaintiff had acquired no title through him by the foreclosure proceedings.

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PROTAP CHUNDER ROY CHOWDHRY v. JOGENDRO CHUNDER GHOSE.

Judgment.

The zemindar supported the defendant in this contention and applied to be allowed to intervene, and was permitted to do so. The Moonsiff, who tried the case, however, finding that the execution of the kabuliut had been satisfactorily proved, considered that the defendant was thereby estopped from contesting the plaintiff's right to receive rent, and accordingly gave a decree for the amount claimed, refusing at the same time to allow the plaintiff's title to the lands to be questioned by the intervenor in the suit. On appeal the District Judge entertained the question of title, and finally reversed the decision of the Court below. Whereupon the plaintiff appealed to the High Court.

Baboo *Grish Chunder Chowdhree*, for Appellant.

Baboo *Hem Chunder Bannerjee*, and Baboo *Oomakali Mookerjee*, for the Respondents.

The judgments of the High Court (1) were as follows :—

JACKSON, *J.*:— JACKSON, *J.*

The plaintiff, named Protap Chunder Roy Chowdhry, brought this suit against the defendant Jurip Duffadar to recover rent on account of lands held by the defendant within a jummah, described as a mourasi jummah, which the plaintiff claimed to hold. It was alleged that the defendant not only held the land, but had executed a kabuliut in favour of the plaintiff in respect of such holding. To use the words of the Moonsiff before whom the suit was tried, "the defendant denies having executed the kabuliut relied on by the plaintiff, and answers that he holds not 15 cottahs as alleged, but 2 beegahs 4½ cottahs of land in Judoonath's jummah.

Judoonath was the previous holder of this jummah which the plaintiff alleged himself to have purchased, and this purchase was the out-come of a mortgage, executed by Judoonath in favour of the plaintiff, which mortgage had been foreclosed. The defendant went on to say that Judoonath had no transferable interest in the jummah when he sold it to the plaintiff, that the zemindar in consequence had taken khas possession of the whole jummah, and

(1) JACKSON and MCDONELL, *JJ.*

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Judgment.

JACKSON, J.

he (defendant) had obtained a lease from the zemindar to whom he had already paid his rent.

The zemindar came in by a petition and was allowed to be made a party defendant, and was called the "intervenor." He also stated that Judoonath's jummah was not mourasi, and was not transferable, but was simply a ryoti tenure; that the plaintiff by his purchase had taken nothing; and that he (the zemindar) had taken khas possession of the jummah.

In this state of the allegations the Moonsiff declined to enter into the question of title between the plaintiff and the so-called intervenor. Why then, that being his view of the matter, he allowed the intervenor, is not very clear. He went on, however, to determine whether the original defendant was bound by his kabuliut, and therefore, firstly, whether the kabuliut was genuine or not. Upon that question, viz., as to the execution of the kabuliut, after hearing evidence on both sides, he found in favour of the plaintiff. He concludes:—For all these reasons "I am of opinion that the kabuliut is genuine, and whatever may be the title of the plaintiff, defendant, who has executed this kabuliut, cannot be allowed to question it." Accordingly he gave judgment for the plaintiff.

This decision came on appeal before Mr. Beverly, the then Judge of 24-Pergunnahs, and Mr. Beverly says:—"In this case it is found by the lower Court, and it has been taken for granted in the hearing of this appeal, that the ryot defendant Jurip did execute the kabuliut in favor of the plaintiff." He then proceeds to raise the question whether the Court below ought to have gone into the question of title between the plaintiff and the intervenor, and he considers that in that respect the lower Court is wrong. He says:—"The ryot defendant was not, in my opinion, estopped from questioning the plaintiff's title by the mere fact of the kabuliut, supposing he was under a mistake at the time he executed the kabuliut. He may have thought at the time that plaintiff's predecessor, Judoonath, had a transferable tenure, and when he discovered that it was not transferable, and that plaintiff had really purchased no rights at all, it was quite open to him to throw up the kabuliut, and to say:—'The zemindar having been made a party to

the suit, the Moonsiff should have decided the question of title instead of leaving it to be decided in a future suit.'" Thereupon the Judge proceeds to go into the question of title to a certain extent, that is to say, to try whether in fact there had existed any mourasi tenure such as the plaintiff claimed to have purchased, and upon the evidence he came to the conclusion that there had been no such tenure, that the plaintiff's vendor had nothing but, at the most, a right of occupancy, and that such occupancy was not capable of mortgage. Accordingly he found that the intervenor had a better title than the plaintiff to the rent, and on that ground he dismissed the plaintiff's suit.

Now, upon the special appeal that arises out of this judgment of Mr. Beverly, there seems to me to be two distinct questions:—First, whether the Judge or the Moonsiff was right in the course taken as to inquiring into the intervenor's title; and, secondly, whether in fact the principal defendant had a good defence in the suit.

As to the first of these questions, I retain the opinion which I have repeatedly expressed during a long course of years, that is to say, that upon a suit brought by a person claiming as landlord for arrears of rent, a third person is not to be allowed to intervene, as it is called, and by setting up a superior claim to the landlord's title, to raise, as between himself and the original plaintiff, an entirely distinct question between new parties. It appears to me that the Legislature, after the repeal of Act X of 1859, and by the omission of any such procedure from the Act which replaced it, has sufficiently indicated its opinion on this point; and it seems to me, not in accordance with the Civil Procedure Code or with the provisions of the Court Fees' Act, that upon a comparatively trivial stake such an issue should be raised, the frame of the suit being at the same time completely altered. This is an opinion which I have on many occasions expressed, and to which I have constantly given effect. In the present instance what are the facts? The plaintiff has purchased, from a person holding a certain tenure, his rights in that tenure. He finds a cultivating tenant under his vendor, and upon taking over the he calls in such under-tenant and obtains from him a The landlord, thereafter, choosing to allege that the

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rights of the holder of this tenure were not of a transferable kind, gives notice to the tenant not to pay rent to the purchaser, and upon the purchaser suing on his kabuliut he has himself made a party to the suit, and in that way anticipates what he otherwise would have to do, viz., bring a suit to oust the purchaser.

Now, turning to the other question which has to be decided in this case, how does it stand? The defendant tenant absolutely denied having executed any kabuliut whatever, and upon that question of fact, the parties go to trial, evidence is given on both sides, and the Moonsiff finds the execution of the kabuliut proved. On appeal, the defendant is allowed entirely to shift his case, and the Judge either allows him to say or suggests for him: "O, when I executed this kabuliut" (up to this time he entirely denied execution) "I did it under a mistake. I thought you had some rights. I have since discovered you have none. I therefore desire to withdraw from my engagement to pay you rent."

It seems to me that this is a change of position which the defendant ought not to have been allowed to make, and which certainly ought not to have been made for him. It is not contended that upon discovering, as he now alleges, the want of title in the plaintiff, he had given plaintiff any notice that he declined to pay rent to him, or that he resiled from his engagement. The plaintiff was allowed to retain the kabuliut and to sue upon it, and when suing he was met with the denial that the kabuliut was never executed. It appears to me that in that state of the case, the defendant having executed this kabuliut, and having resisted the plaintiff's suit by denial of such execution, only expect that upon that denial being found false, the Court should give judgment in favor of the plaintiff for his rent. That being so, is the plaintiff to be turned out by an objection from a third person that not the plaintiff who has got the defendant's engagement but that third person is the preferable owner? If the plaintiff, having been let into possession through this kabuliut executed by the defendant, has no right to retain the tenure, let him be ousted by a suit properly brought for that purpose by the person claiming better title. It appears to me

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Judgment.

McDONELL, *J.*

that that is the only regular and proper course by which the plaintiff can be deprived of the right which he conceives himself to have obtained. I think, therefore, that the judgment of the Moonsiff was right, and that of the lower Appellate Court was erroneous and must be reversed.

On the application of the intervenor's vakeel, the intervenor is allowed to withdraw from the suit, he paying his own costs and all other costs incurred in the suit by his intervention.

McDONELL, *J.*:—

I concur.

[ORIGINAL CIVIL JURISDICTION.]

1879 *April 3rd.*

SHAM LALL SINGH . . . . . PLAINTIFF;

AND

RADHA BIBEE AND ANOTHER . . . . . DEFENDANTS.

Evidence Act, I of 1872, section 32, clause 5—Relationship, Evidence of Family Priest as to—"Special Means of Knowledge."

Evidence of statements made by a deceased family priest as to the relationship of the members of the family, may be given under section 32, clause 5, of the Evidence Act.

IN this case the plaintiff sued for a declaration that he was entitled to certain pieces of land as the heir of one Moonoo Lall, who died in 1876, without issue and unmarried.

Moonoo Lall was the son of Choonoo Bibee, the daughter of Nundoram, the brother of the plaintiff, by Radha Bibee, one of the defendants.

By the defendants it was alleged that Choonoo Bibee was an illegitimate daughter, as her father had not been legally married to her mother. The plaintiff, on the other hand, denied this, and alleged that there had been a legal marriage, called the son of Nundo- late family priest to prove certain statements made by his with reference to the marriage of Nundoram and Radha

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Judgment.

Jackson, (for the Defendants), objected to the witness giving evidence of statements made by his father, and contended such evidence was not admissible, on the ground that the family priest could not be said to have 'special means of knowledge' as to the relationship, within the meaning of section 32, clause 5, of the Evidence Act. The only persons who could be said to have the special means of knowledge contemplated by the Act, were persons who were themselves members of the family.

WILSON, *J.* WILSON, *J.* :—

The section is quite wide enough, I think, to include the family priest. In construing a section of an Act in this country, the words are to be considered with reference to the language used, and not with reference to any supposed analogy to the English law.

[CIVIL APPELLATE JURISDICTION.]

KOMUL LOCHUN DUTT AND ANOTHER (DEFTS.) APPELLANTS; AND NILRUTTON MONDUL (PLAINTIFF), RESPONDENT.

1878 *August 24th & September 12th.*

No. 1560 of 1877.

Probate of Will, Revocation of—Procedure—Revocation of Probate, Right of Assignee of Heir to apply for.

Plaintiff who, in June 1875, purchased the interest of the widow and sole heiress of one J. D., who died in 1872, brought a suit for possession of the same, alleging that J. D. had died intestate, and that a will of which the defendant, the brother of deceased, had obtained probate on the 13th November 1875, and on which he relied, was a forgery. The Subordinate Judge, being of opinion that probate was conclusive of the genuineness of the will, dismissed the suit. But on appeal the District Judge remanded the case, directing the lower Court to try the issue as to the genuineness of the will. Upon trial, the will was found to be a forgery, and upon this finding the District Judge decreed the plaintiff's suit.

Held, that the Subordinate Judge had no power to determine the issue, whether the will was genuine or not, and that the proper course for the party seeking to impugn the will was to apply to the District Judge to revoke the probate under the provisions of the Indian Succession Act.

Procedure to be followed in suits for revocation of probate discussed.

Semble:—That the assignee of the heir can apply to revoke the probate.

Byjnath Shahai vs. *Desputty Singh*, 25 W. R., 489, cited and distinguished; *Mayho* vs. *Williams*, 2 N.-W. P. H. C. R., 268, followed.

APPEAL from a decree passed by the Additional Judge of the 24-Pergunnahs, reversing the decree of the 2nd Subordinate Judge of that district.

In this case it appears that one Joynarain Dutt died on the 23rd Pous 1278, childless, leaving a widow, Bogolamoye Dassee, who would, therefore, under the Hindu Law, succeed to his

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Statement.

estate. It does not, however, appear that Bogolamoye ever got into possession of her husband's property, and on the 13th November 1875, Komul Lochun Dutt, the elder brother of the deceased, obtained probate from the District Court of the 24-Pergunnahs of a will executed by the deceased shortly before his death, nobody having appeared to oppose it.

Prior to the grant of probate, namely in June 1875, the widow had sold her interest in her husband's estate to the plaintiff in this suit, but on 27th November 1875 she applied for a revocation of that probate. The District Judge on 21st December 1875, examined her, and finding that she had no witnesses in attendance, and could only say that no will had been executed, he dismissed her application, remarking also as she "admitted that she had sold the property of her husband it became evident that she at least had no interest in asking for revocation of the probate."

The plaintiff now sues to recover the widow's share of the property upon the strength of his purchase, alleging the will to be a forgery. Komul Lochun, who is in possession, defends the suit upon the ground that the will is genuine, and that by the will the property was bequeathed to himself for certain purposes therein specified. He also alleges the sale by the widow to be fictitious. A person named Kodombiny was also made a defendant, and she denies the title, both of the plaintiff and of the defendant Komul Lochun.

The Subordinate Judge found that the plaintiff was entitled to recover if the will did not bar him. He considered that the grant of probate was conclusive as to the genuineness of the will, and that on the true construction of the will, the defendant Komul Lochun was entitled to hold possession of the property, and that the plaintiff's suit for possession ought to be dismissed.

Upon appeal, the District Judge ordered the Subordinate Judge to try the genuineness of the will, upon the ground that the grant of probate might be impugned in a regular suit.

The Subordinate Judge, on the trial of this issue, found the will to be a forgery, and upon this finding being returned to the District Judge, he gave the plaintiff a decree for the share of the property which had belonged to the deceased.

Both Kodombiny and Komul Lochun appealed to the High Court against this order.

Baboo *Opendro Chunder Bose*, and Baboo *Bahary Churn Dutt* (Senior), for the Appellants.

Baboo *Mohesh Chunder Chowdhry*, and Baboo *Nil Madhub Bose*, for the Respondent.

The judgment of the High Court (1), after stating the facts, proceeded as follows :—

We think that the District Judge was wrong in holding that the grant of probate could be impugned in this suit. The grant of probate is the decree of a Court, which no other Court can set aside except for fraud, or want of jurisdiction, and no such ground is alleged here.

What, however, the District Judge really meant (as appears from his second judgment) is, that the grant of probate was not conclusive as to the genuineness of the will, and that notwithstanding the probate, the will might be questioned in a civil suit in which the will was relied on. In this view we are unable to agree.

Section 242 of the Indian Succession Act declares that "probate or letters of administration shall have effect over all the property and estate, moveable or immoveable, of the deceased, throughout the province in which the same is granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belong to him, and shall afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration have been granted."

The language of this section is clear upon the point before us. When the probate is granted it operates upon the whole estate, and, by section 188, it establishes the will from the death of the testator and renders valid all intermediate acts of the executor as such. The property vests in the executor by virtue of the will, not of the probate. The will gives the property to the executor, the grant of probate is the method which the

(1) MARKBY and PRINSEP, *J.J.*

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Judgment.

law specially provides for establishing the will. So long as the probate exists it is effectual for that purpose.

It would lead to the greatest confusion if the validity of the will could be questioned in a civil suit after the grant of probate. There might be any number of conflicting decisions as to the validity of the will. The executor would be exposed to endless litigation, and he would never be safe in dealing with the property of the deceased.

This view is in accordance with the decision of the Allahabad Court (2 N.-W. P. H. C. R., 274). There TURNER, Officiating Chief Justice, says :—"The Judge seems to have considered that a grant of probate is in the nature of a summary proceeding to be contested by a regular suit in the Civil Court. This view is wholly erroneous. The grant must be contested by a suit in the Court out of which the grant issued, and it must be contested before the Court sitting as a Court of Probate, and not in the exercise of its Ordinary Civil Jurisdiction."

The proper course, if it is suggested that the probate has been wrongly granted, is to apply to the District Judge to revoke the probate for which a special procedure is provided by the Act, and in that case the executor and other persons who have acted upon the faith of the probate, are protected by section 262.

In consequence of what has occurred in this and other cases, we think it may be desirable to point out what we consider to be the nature of the procedure for obtaining a revocation of probate. The probate can be revoked upon any of the grounds mentioned in section 234. The duty of the Judge, upon an application being made under this section, somewhat depends upon what has passed on the previous grant of probate. Clearly, however, the first thing for him to do is to direct notice to be given to the executor and all persons interested under the will, or claiming to have any interest in the estate of the deceased. It is also clear from section 261 that the executor will be the plaintiff in the regular suit which the Judge will then have to try. And the object of this is clear. It is in order to enable the Judge, if he thinks proper, to call upon the executor to prove the will again in the presence of the objector notwithstanding the prior probate, just as in England he may be called upon to prove the will in solemn

form. But a discretion is left to the Judge. Where there has been already full enquiry as to the genuineness of the will, the Judge would probably take, as he would have a right to take, the previous grant of probate as *primâ facie* evidence of the will and so shift the onus on to the objector. But if there had been no previous contention, and the will had only been proved summarily, or in what is called common form in England, that is, without any opposition and merely *ex-parte* to the satisfaction of the Judge who can know nothing of the circumstances or the state of the family, then he ought, in all such cases, to have the will regularly proved afresh, so as to give the objector an opportunity of testing the evidence in support of the will before being called upon to produce his own evidence to impeach it. For example, when, as has actually happened in this case, the widow applied to have the probate revoked, the District Judge rejected her application without giving any notice to any one, because she did not make a *primâ facie* case against the will. We think that was wrong. The District Judge should have summoned the executor and the other parties interested under the will and in the estate of the deceased, and should in such a case as the present have required the executor to prove the will in the presence of the widow.

So also when the applicant for probate is about to prove a will in common form and a *caveat* is put in—unless the parties signify their desire at once to proceed to trial—it is preferable that a postponement should be granted so that there may be a formal trial of the matter on all the evidence that either side may be able to adduce.

If this procedure be followed, we do not see what are the disastrous consequences of holding probate to be conclusive to which the District Judge alludes. It was said that the plaintiff in this case would be remediless, because according to the decision in 25 W. R., 489, he could not apply to revoke the probate. The point is not directly before us, but as at present advised, we think that the plaintiff could apply to revoke the probate. He is interested by assignment in the estate of the deceased, and if there be no will, he has a good title at any rate as against Komul Lochun, so far as the will is concerned.

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Judgment.

We do not, therefore, see why he should not apply to revoke the probate. The ground of the decision in 25 W. R., 489, was, that the party there, a creditor of one of the next-of-kin, had no interest in the estate of the deceased. A purchaser from the next-of-kin is in a very different position from a creditor. If we thought that that decision went so far as to show that a purchaser or an attaching creditor could not apply for revocation of a probate, we should, as at present advised, refer the point to be settled by a Full Bench, because we should disagree from such a rule.

We think the proper course in this case is to postpone the final decision of the suit until the plaintiff has had an opportunity of applying to the District Judge to revoke the will. If that application be successful, and probate be revoked, the decree of the Court below will stand, and this appeal will be dismissed with costs. If that application be unsuccessful, the decree of the Court below will be reversed, and the present suit will be dismissed with costs in all the Courts. The application to revoke must be made within a month, and if not made, the defendants may apply to have this suit dismissed with costs.

We do not understand why the issue raised by Kodombiny has not been tried. The evidence being complete, there is no reason why it should not be so. Her case is wholly independent of the validity of the will.

[CIVIL APPELLATE JURISDICTION.]

JUDAB LALL ADITTA DEB . (DEFENDANT) APPELLANT;

AND

RAJAH WOODOY ADITTA DEB (PLAINTIFF) RESPONDENT.

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April 8th.

Nos. 1474 & 1578 of 1878.

RAJAH WOODOY ADITTA DEB (PLAINTIFF) APPELLANT;

AND

JUDAB LALL ADITTA DEB . (DEFENDANT) RESPONDENT.

Hindu Law—Impartible Raj—Alienation by Father.

Although maintenance grants, conferred by the possessors of impartible Rajs in Chota Nagpur, cease with the life of the grantor, and are resumable at the pleasure of the succeeding Rajah, the effect of the impartibility of such estates does not interfere with the ordinary law as to rights over property beyond making the Rajs pass to the eldest son, subject to certain obligations imposed upon him of allowing maintenance to the junior members of his family. *Anund Lall Singh Deo* v. *Maharajah Dheraj Gurrood Narayan Deo*, 5 M.I.A., 82, discussed.

APPEALS from an Appellate Decree passed by the Officiating Judicial Commissioner of Chota Nagpur, affirming a decision of the Deputy Commissioner of Manbhum.

The plaintiff in this case sued to recover possession of lands held by the defendant under two instruments, both admittedly genuine,—one a mokurrari pottah, dated 19th Bysakh 1275 B., and the other a maintenance mokurrari pottah (mokurrari khorposh), dated the 16th Aughran of the same year. The grantor of these pottahs was the Rajah of Patcum in the district of Manbhum: the grantee being his second son. The plaintiff is the present Rajah and the eldest son of the late Rajah. The plaint alleges that there has been a custom from time immemorial in the Raj family of Patcum, that on the death of a Rajah, his eldest son becomes the Rajah of the ancestral Raj, left by the deceased, and holds and enjoys possession of the entire Raj of Patcum; that the second son gets the title of Hakim, the third that of Kunwur, and the fourth and younger brothers are called Lals; that all the younger brothers are entitled to proper maintenance from their

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eldest brother and not from their father; that estates granted over for maintenance continue to serve that purpose only so long as the grantor and the donees live. The defendant denied the existence of this alleged custom.

By the two deeds, which it was now sought to set aside, the former Rajah had granted to the defendant two villages on an alleged consideration of Rs. 1,200, subject to an annual rent of Rs. 85-10-2 by the deed of 19th Bysakh, and eight villages by way of khorposh mokurrari or maintenance grant, by the deed of 16th Aughran. The latter villages were to be held by the defendant's descendants, subject to a rent of Rs. 159-15-5. Evidence having been gone into, the lower Courts found that the father of the plaintiff, according to the custom of the family, had no power to make a maintenance grant to ensue after his own death, and accordingly declared the khorposh mokurrari to be invalid.

As to the other pottah which purported to be an independent transaction between the defendant and his father, they found that the right to alienate lands belonging to the Patcum Raj was established, it having been shown that former Rajahs had executed similar mokurraris, and that this mokurrari must therefore be upheld.

Both plaintiff and defendant appealed to the High Court; the former on the ground that both instruments ought to have been declared invalid, and the latter on the ground that the khorposh grant ought not to have been set aside. The appeals were heard separately.

Woodroffe, and Baboo *Bama Churn Banerjee*, for the (Plaintiff) Appellant.

Baboo *Sreenath Dass*, and Baboo *Rashbehary Ghose*, for the (Defendant) Appellant.

The two appeals were argued separately, the plaintiff's appeal being taken first.

Woodroffe.—The practical result of the decree of the lower Court is, that the reigning Rajah will be able to assign away all his property to strangers to the exclusion of his sons.

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Argument.

[MITTER, *J.*—Is this case governed by the Bengal School?]

I shall submit that it is not so. Even assuming that the Bengal School applies, I know of no law which enables a man to alienate property which does not belong to him. The grant which created the Patcum Raj gave each successive owner restricted rights only. If I can show that by the custom of this particular family the estate is impartible, it will lie on the other side to show that at any time the Rajah for the time being could alienate the property—*Anund Lall Singh Deo* vs. *Maharajah Dheraj Narayan Deo*, 5 M. I. A., 82, see pp. 86 and 102; Reg. App. 103 of 1877, 19th August 1878 (not yet reported.)

The holder of an indivisible zemindary has no power to alienate any portion of the zemindary—*Maharajah Kishen Kishore Manick* vs. *Mussamut Hurree Mala*, 6 Select Rep., 155.

In a subsequent case, S. D. A., 1,857, p. 1375, the Sudder Dewanny Adawlut, commenting upon this case, introduced a distinction, founded on a special custom of Tipperah, which allowed alienation to a certain extent, but here there is no evidence of any such custom.

Hurree Mala's case shows that the legal incident attached to an indivisible zemindary is, that it shall not be subject to alienation. Such an estate as this can only be subject to alienation by custom, and this custom must be proved.

There may be a distinction between voluntary and involuntary alienation, but I shall restrict myself to voluntary alienations. It was with reference to the existence or non-existence of such a custom that the Sudder Dewanny Adawlut decided the case in S. D. A., 1857, p. 1375, and even upon this decision the mokurrari must terminate with the grantor's life. In the case of *Roop Moonjuree Kooeree* vs. *Beer Chunder Joobraj*, 9 W. R., 308, the plaintiff relied on Hurree Mala's case, 6 Select Rep., 270, to prove that by the custom of the family (that of the Rajah of Tipperah) any grant of this nature made to a member of the Rajah's family was resumable on the death of the grantor. The defendant, on the other hand, rested her case on the fact that the Sudder Dewanny Adawlut had, on 28th March 1857, (see Decisions for 1857, p. 1375) distinctly ruled that the custom restricting such grants to the life of the grantor is one which exists only as regards

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those who are members of the family of the Rajah of Tipperah, and that she having married into another *gottra*, was no longer a member. The High Court held that the family custom was applicable to the defendant even after marriage.

But it has been held, further, by the Privy Council that Tipperah is an impartible Raj and zemindary, while, according to the decision in 6 Select Reports, the estate being impartible, it is not competent for the Rajah to make even a lease of any portion of the Raj to which he has succeeded.

These cases exhaust the question with respect to mokurraris granted by the Rajahs of Tipperah.

Now, admitting that the mokurrari here was to a member of the family, and that we are to look to the rules which regulate such impartible estates, to the customs of the family and to the incidents which naturally flow out of, and are consistent with, such impartible estates, this particular grant comes strictly within the later decisions.

Almost all the cases up to date on the subject of impartible estates are referred to by the High Court in *Maharani Hiranath Koer* vs. *Baboo Ram Narayan Singh*, 9 B. L. R., F. B., 274; see the remarks of the Privy Council at p. 321.

In *Rajah Ram Narayan Singh* vs. *Pertum Singh*, 11 B. L. R., 397, the principle upon which such estates descend, according to Mitakshara Law, is pointed out.

It is not because of any family custom, but because the estate is impartible, and must go to one person, that it descends to the eldest son.—See the remarks of the Privy Council in the Shivagunga case, 9 M. I. A., p. 588. "Impartible," as used in such cases as these, means that not only the property, but also the enjoyment is indivisible, and must be in the hands of one person.

In the Pacheet case—5 M. I. A., 82—the contention was whether or not there had been a division of the zemindary. No distinction was drawn between indivisibility and inalienability.

Even suppose, I do not make out this estate of the Patcum Rajah to be absolutely inalienable, I am on sure ground when I say it is not divisible among the members of the family; for it comes, as I have already said, within the express rulings in the Tipperah cases, while there is further authority for my contention

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in 5 M. I. A., 82, and in 22 W. R., 225, and in a recent unreported case, decided by JACKSON and TOTTENHAM, *J.J.*

My arguments therefore are these :—*First.*—This estate being impartible and capable of enjoyment by one person only, the Rajah was not able, having regard to the nature of that estate, to make a grant of a mokurrari lease which could inure for any period extending beyond his own life, and that is so whether the estate was subject to the Mitakshara or the Bengal School. *Secondly.*—It being found and admitted in this case that the Rajah could make such an alienation to a stranger, he cannot do so in respect of a member of his own family.

[MITTER, *J.*—Not if he receive consideration for it ?]

No. But in this case it has been found that the grant was not a *bond fide* mokurrari lease, but a contrivance to avoid what has been found to be a family custom.

If these arguments are not sufficient, it will be necessary to have an issue tried as to whether the property in question is subject to the Mitakshara or the Bengal School of Law?

[MITTER, *J.*—There appears to have been no issue framed on the point whether it was a contrivance to avoid the custom, and it would be necessary to try that issue also.]

Sreenath Dass, for the defendant, contended that it was for the appellant to have shown a custom forbidding alienation, and that the lower Courts had found he had failed to do so.

Before Regulations XI of 1793 and X of 1800 there was a custom which allowed the eldest son to succeed to the estate. These Acts, however, seemed to show that the proprietor had the power of making a disposition of the estate, but that if he did not make any alienation it went to his eldest son.

Further, the property was in Bengal, and must be governed by Bengal Law, according to which any person might make a disposition of property. There was nothing to show that the family was governed by Mitakshara law.

The case in 5 M. I. A., 82, referred to by the other side, supported his view ; for though property may be indivisible, it did not follow that it is inalienable.

In the other appeal by the defendant—

Sreenath Dass contended that before going into the question as

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to whether the grant under the khorposh mokurrari could last c until the death of the grantor, the Court should have enqui whether there was a custom or not in the family to that effect. ' question as to the family custom had not been properly raised the issues settled in the case, and the Courts had no power assume that there was such a custom. Nor had the Courts be settled the further question whether the grant could ens beyond the life time of the grantor, in any event.

The plaint itself admitted that grants for maintenance m by any incumbent of the Raj might last 'as long as the grai and donees might live.' This must be taken as an admission t the grant now under consideration is, at all events, valid, until death of the donee—the defendant.

Woodroffe (for the Respondent.)

The maintenance to which the younger brothers are entitle a maintenance from their eldest brother, the existing Rajah, not from their father. The words "as long as the grantor donees may live," quoted from the plaint, do not amount to admission; they simply mean 'during the joint lives of grantor and donees.' The plaint does not say 'grantor *or* done There is a direct finding in connection with this Raj, that grant will at least not go to the heirs of the donees—*Ra Woodoy Aditto Deb* vs. *Mukoond Narain Aditto*, 22 W. R., 2 In that case it was decided that on the death of the donee grantor might resume the maintenance grant, clearly show that the grant was only for their joint lives. See also *Mahara Bir Chunder Manickya Bahadur* vs. *Ishan Chunder Thal* 3 C. L. R., 417, where a maintenance grant claimed to hereditary was held to be for the life of the grantor only.

Here it was distinctly found that the granting of this d purporting to ensure beyond the life of the late Rajah was c trary to the custom of the Patcum Raj, and that the main nance coming from the father ceased upon his death. On t event the defendant became entitled as *hakim* to maintena from his brother the plaintiff. This could only be by the cust of the family, for the ordinary law takes no notice of such right.

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[MITTER, *J.*—The custom has reference only to a maintenance given by the eldest to the younger brothers. It seems to have no reference to grants made by the father to his sons.]

That may be so in one sense, but it is impossible to suppose that a man should be allowed to get a maintenance from his father to spite his brother, and should still be entitled to another maintenance from that brother on his father's death, the first still subsisting. It was, however, admitted in the Pacheet case,—that a maintenance grant from the late Rajah cannot subsist during the lifetime of the reigning Rajah. The case cited from 22 W. R. proceeded upon the same admission—p. 227. In this particular case it was expressly found that the grant was a maintenance grant. In the other appeal the grant practically amounted to a maintenance grant, though it was not such in form.

[MITTER, *J.*—It seems to me that the distinction is this,—that where the grant is not an alienation at all, but merely an assignment by way of maintenance, it is by the family custom resumable upon the death of the grantor; but that when there is a grant and transfer of the property to the grantee, then there is such an alienation as cannot be resumed by the succeeding Rajah. Now, the Privy Council in the Pacheet case held that there was no alienation at all, but only a maintenance grant.]

That is exactly what I contend for here. This case, too, is a stronger case than the Privy Council case; for here the grant is expressly limited by the deed to maintenance, while there no such express limitation existed.

When that case was before the Privy Council there was a doubt whether such estates as the Pacheet Raj and this Raj were indivisible. It has now been established that they are so. There is also an unreported case decided by JACKSON and TOTTENHAM, *J.J.*, where the grant was admittedly for maintenance.

[MITTER, *J.*—That may be so, but here the other side rely upon the right of alienation which they allege to exist on the Rajah. Now the Privy Council case turned upon the fact that the grant there was not an actual alienation.]

Not so, but upon the fact of the grant being for maintenance.

Sreenath Dass in reply.

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Judgment.

The judgment of the Court (1) was as follows :—

This suit is brought to set aside two grants made by Rajah Suttroghun, the late Rajah of Patcum, in favour of his son Jadub Lall, who is the defendant in the suit.

The first of these grants, dated 19th Bysakh 1275, purports to be a mokurrari grant, executed in consideration of the sum of Rs. 1,200 paid by Jadub Lall, its effect being to assign to him and his descendants two villages at a fixed annual rent of Rs. 8,510-2-2.

The second grant bears date the 16th Aughrán 1275, and is what is known in Manbhum as a "mokurrari khorposh" or maintenance grant. It recites that eight villages had been previously assigned to Jadub Lall for his maintenance as Hakim, but that it being desirable that the assignment should be formally recorded the deed is executed. By it eight villages are made over to Jadub Lall in khorposh right for his life, and on his death his male descendants are declared entitled to hold the villages at a fixed rent.

The plaint sets forth that according to the custom prevailing in the Raj of Patcum upon the death of a Rajah, his eldest son becomes Rajah and takes the entire Pergunnah of Patcum; the second son is styled Hakim, the third Kunwur and the younger sons Lals, each and all of whom are entitled to maintenance from the Rajah for the time being; that estates which have been assigned for maintenance by the former Rajah revert at his death to his successor in the Raj, who can deal with such estates as he pleases. Admitting that grants had been made in favour of Jadub Lall, the plaintiff states that the late Rajah had no authority to make any settlements of estates beyond his own life, and prays that the grants be set aside.

The defendant states that, according to the family custom, a "khorposh" grant cannot be resumed in the lifetime of the donee. That the Rajah for the time being having absolute control over the whole zemindaree of Patcum is fully competent to make mokurrari grants on receipt of consideration.

The first Court held that the plaintiff had proved that the granting of the "mokurrari khorposh" was contrary to the custom

(1) BIRCH and MITTER, *JJ.*

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of Patcum. The Deputy Commissioner, referring to a judgment passed by him in an analogous case, states that the customs of the Raj of Patcum are similar to those prevailing within the Raj of Pacheet, which have been under consideration before the Courts, and been the subject of judicial determination; and being of opinion that such grants inured only for the lifetime of the grantor, he gave the plaintiff a decree for possession of the villages comprised in the khorposh grant.

With regard to the mokurrari grant, the Deputy Commissioner held that the right of the actual Rajah to alienate land in Patcum was proved, and that whether consideration had passed or not, the grant was one which the late Rajah was competent to make, and he dismissed the plaintiff's claim to the villages mentioned in the mokurrari pottah.

On appeal, the Judicial Commissioner confirmed the decree of the first Court as to the resumption of the "khorposh" villages, remarking that any thing given to Jadub Lall by his father by way of maintenance would cease on the father's death, or be liable to resumption by the succeeding Rajah. The Judicial Commissioner refers to a judgment of the Deputy Commissioner in another case in which that officer had decided that grants of permanent maintenance were, by the custom of this family, invalid.

As to the mokurrari pottah, the Judicial Commissioner held that the general power of alienation by the Rajah for the time being was proved, and that the plaintiff had failed to show any infringement of the family custom by the making of such a grant by the late Rajah. The order of the first Court was confirmed.

Against this order both parties have preferred a Special Appeal —the plaintiff against so much of the order as declares the alienation of the two villages in mokurrari to be valid; the defendant against that portion of the order which declares the plaintiff entitled to resume and obtain possession of the eight villages granted to him as mokurrari khorposh.

As regards the defendant's objection, we think that it is now too late to contend that the mokurrari khorposh or maintenance grant is not resumable at the death of the grantor. Since the judgment in the case of *Anand Lall Singh Deo* vs. *Maharajah*

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Dheraj Narayan Deo, 5 M. I. A., 82, it has invariably b held that maintenance grants, conferred by the possessors of th impartible Rajs in Chota Nagpur, cease with the life of the gra or, and are resumable at the pleasure of the succeeding Rajah.] while the power of resuming vests in the successor, on the Raj death a corresponding obligation is imposed upon him by fan custom to provide maintenance for his brothers according to tl seniority and status in the family as Hakim, Kunwur or] The Judicial Commissioner is, therefore, right in giving the pl tiff a decree as regards these eight villages, and the appeal of defendants is therefore dismissed. Each party in that appea bear their own costs.

We have next to consider whether the late Rajah had the po of alienating in perpetuity any portion of the zemindary, whet for valuable consideration, or as a gift. The estate is an imp tible one, but the effect of impartibility does not seem to inter with the ordinary law as to rights over property beyond this, t it makes the estate pass to the eldest son. It becomes his sepa property subject to certain obligations imposed upon him allowing maintenance to the other members of the family. right to alienate under the ordinary law, can only be restrai by some family custom which has the effect of over-riding controlling the general law. Now, the only custom proved is, t the estate descends to the eldest son to the exclusion of the ot sons; to this extent the custom supersedes the general law as the devolution of property; but beyond the custom, the gen law must regulate all rights of property. And under general law the taker of the property may make alienations gifts. It is found by both the lower Courts upon the evidence this case that such alienations have been, and are, made in t zemindaree of Patcum. And in other estates in Chota Nag of a similar character, it has been found to be the case that gra of jaghirs and mokurraris have been made by the holder for t time being of the impartible estate—*Thakur Kopil Nauth S Deo* vs. *Government*, 22 W. R., 17.

It is contended by the learned Counsel, who appears for t plaintiff, that the holder of an impartible estate is, by the nat of his tenure, debarred from diminishing the estate by any gra

or gifts; that all he can do is to make maintenance grants, which grants inure only for his life; and the case cited as an authority for this proposition is the case of *Anund Lall Singh Deo* vs. *Maharajah Gurrood Naryan Deo*, 5 M. I. A., 82.

We think that if that case is carefully examined, it does not warrant the construction that is sought to be put upon it.

The dispute in that case arose between the defendant as representative of Kunchun Lall, and the plaintiff as the head of the family, the defendant's allegation being that the Rajgee of Pacheet had been equally divided in 1748 between Mumee Lall and Mohun Lall; that in 1773 Mumee Lall, by compromise, obtained the whole of the Raj, save and except Pergunnah Kasaipoor, which, by deed of gift from Kunchun Lall, became the property of his adopted son, Lathorgon, the gift being absolute, and in consideration of the compromise by the terms of which the Rajah recovered the rest of the moiety by Mohun Lall in 1748.

The Sudder Court held that the defendant's allegation of a division of the Raj was false; that it was clear that Mumee Lall had been invested with the entire zemindaree; that any grants made by the Rajah for the time being were liable to be annulled and cancelled by his successor. The pergunnah in dispute was declared to be part of the estate, and the grant was set aside as invalid.

Before the Privy Council the point considered was the title which Kunchun Lall had to the Pergunnah of Kasaipoor. It was admitted on the part of the defendant, appellant, that if the grant was a maintenance grant, it ceased with the life of the grantor, but the case he sought to establish was, that the pergunnah had been given to Kunchun Lall for consideration, and that such alienations were within the power of the Rajah in possession of the estate. This he failed to establish, and it was held that there had been no division of the estate as alleged; that it had come entire to Mumee Lall; and that the grant obtained by Kunchun Lall was a maintenance grant which admittedly lapsed on the death of the grantor. Their Lordships say that the inalienability of the zemindaree had not been sufficiently established, and they do not decide the question raised before

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them by the respondent as to the power of the Rajah to b his successors by a permanent grant of property belonging the Raj. The whole judgment is directed to the determina of the nature of the grant, whether it was a maintenance gr or not, and the decision being that it was a grant of that nat the case was disposed of on that ground only.

So far as we are aware, it has never been held by the P Council that an impartible estate is inalienable.

Our attention has been called to an unreported judgment c Division Bench of this Court in which a remark is thrown that alienations in perpetuity of an impartible estate are voida but the case in which this remark was made was one in whi maintenance grant was the subject of consideration and decisi

Accepting, as we must, the finding of the lower Courts, t mokurrari grants have been made in this zemindaree by Rajahs in possession, and being of opinion that such grants not prohibited by law, or restrained by family custom in zemindaree of Patcum, we must also dismiss the special a preferred by the plaintiff.

Each party to bear his own costs in this Court.

[ORIGINAL CIVIL JURISDICTION.]

REENDER CHUNDER GHOSE AND OTHERS . PLAINTIFFS ; 1878 *July 16th.*

AND

L. B. MACKINTOSH AND OTHERS . . . . . DEFENDANTS.

Hindu Executors and Devisees, Powers of—Notice—Purchaser from Hindu Executor, Position of—Act IX of 1871, *section* 10, *and Schedule II, Articles* 115, 133 *and* 134.

In 1867, the plaintiffs, who were the executors under the will of A. G., having failed to obtain satisfaction of a decree obtained by them as such against the representatives of one A. D. in respect of a joint liability in connection with a Company of which A. G. and A. D. and others had been directors, filed a suit in 1872, for administration of A. D.'s estate, and were found to be creditors to the extent of Rs. 30,000, which sum, however, they failed to realize out of the estate. Subsequently it was discovered that certain properties, portion of the estate left by A. D., had been mortgaged to the defendant M., and were in his hands. The properties in question had been mortgaged under two deeds of mortgage executed in pursuance of a bond, dated 24th June 1863, by the executors of A. D., two of whom were also residuary devisees, and as such entitled to his estate subject to his debts and liabilities, to secure a loan of Rs. 1,00,000 taken from M. through his solicitor. The bond described the properties as the "absolute property of the executors or some or one of them." The first mortgage was executed on the 14th of July 1863, after payment of Rs. 95,000. The executors had transferred their business to M.'s solicitor on the 7th of July, but up to that time he had not been allowed to become possessed of any cause papers or documents which could have given him notice of any liabilities due from A. D.'s estate, and before that date Rs. 85,533 had already been advanced upon the bond. The second mortgage, which was executed on the 6th August of the same year, giving of further security for the whole Rs. 1,00,000 advanced, recited A. D.'s liability in respect of the will of his father and the will of his brother, but made no mention of the plaintiff's claim.

In 1868, the defendant M. foreclosed his mortgages.

The plaintiffs filed this suit on the 23rd November 1876, as supplemental to the administration suit of 1872, on behalf of all the creditors of A. D.'s estate, claiming a right to follow the property in M.'s hands, and to have the same duly administered on the ground, first, of the express notice given to M.'s solicitor in the second mortgage that A. D.'s estate

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was still liable in respect of certain claims connected with the estates of his father and brother which ought, it was alleged, to have put him on further enquiry; and, secondly, of the constructive notice of M. through his solicitor who acted as solicitor of both parties in the mortgage transaction.

Held, by PONTIFEX, *J.*, that, although neither in the case of the heir nor of the devisee of a Hindu, has there been a distinct statutory provision as in England that lands may be followed in the hands of a purchaser, unless he is a *bonâ fide* alienee, the question as to how far lands purchased from a Hindu heir or devisee are liable in the hands of the purchaser of the testator's estate stands on the same ground as a similar question under the present English Law, according to which property, *bonâ fide* aliened before action brought, cannot be followed into the possession of a purchaser from the heir or devisee, if it can be proved that the purchaser knew (1) that there were debts of the ancestor or testator left unsatisfied; and (2) that their heir or devisee to whom he paid his purchase-money intended to apply it otherwise than in payment of such debts.

Also, that for a purchaser to be affected with constructive notice through his solicitor, the latter must have actual notice, and that the plaintiffs, on whom the burden of proof lay, had failed to prove that at the time the Rs. 95,000 was advanced, the defendant's solicitor had actual notice of the liabilities of A. D.'s estate, or that M. or his solicitor had notice of any intended misapplication by the executors of the money advanced.

Corser vs. *Cartwright*, L. R., 7 E. & I., 731, cited.

On appeal *held*, that the suit was barred by limitation, as having been brought more than 12 years after the date of the mortgages, 12 years being the period of limitation applicable to the case under section 118 of Act IX of 1871.

Per GARTH, *C.J.*:—The words "in trust for a specific purpose" in section 10 of Act IX of 1871 are intended to apply to trusts created for some defined or particular purpose or object as distinguished from trusts of a general nature such as the law imposes upon executors who hold recognised fiduciary relations.

Kherodemoney Dossee vs. *Doorgamoney Dossee*, 3 C. L. R., 315, cited and followed; *Lallabhai* vs. *Manuhvarbai*, I. L. R., 2 Bom., 389, distinguished.

APPEAL from a decision of Mr. Justice PONTIFEX.

Ramdolall Day, a Hindu inhabitant of Calcutta, died in the year 1825, leaving him surviving two sons, Aushootosh Day and Promothonath Day. Ramdolall Day had made a will, of which he

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appointed his sons executors, and they entered into possession of their father's property, but did not pay certain legacies which had been left by Ramdolall to his relatives. Pending the carrying out of an agreement for partition which had been entered into between the two brothers, Promothonath died in the month of December 1849, leaving a will, of which he appointed his brother Aushootosh Day, and his two wives Nobinmoney Dossee and Santomoney Dossee executor and executrices. By this will various legacies were left to the testator's relatives, and all the rest and residue of the property was bequeathed to the testator's two adopted sons, Onathnath Day and Monomathanath Day. Aushootosh Day took out probate of the will and entered into possession and management of the property, but failed to pay the various legacies which were given by the will. In the year 1854, a suit was instituted by Onathnath Day and Monomathanath Day against the executors of their father's will, praying for a partition on the footing of the unfinished arrangement of 1849, and an account. On the 28th of February 1855, a decree was passed in this suit, directing, *inter alia*, that the agreement for partition should be carried out, and accounts taken on the footing thereof, and directing also that an account should be taken of the estate of the said Promothonath Day, which had come to the hands of Aushootosh Day and his co-executors, and the payment of whatever might be found due from them. Pending the taking of the accounts, Aushootosh Day died, on or about the 30th of January 1857, leaving a will, of which his wife Nobinmoney Dossee, and his grandsons Charroo Chunder Ghose and Surruth Chunder Ghose were appointed executrix and executors. The suit above-mentioned was duly revived against them, the taking of the accounts was proceeded with, and on the 12th of October 1863, the Master of the late Su preme Court found and reported that the sum of Rs. 1,32,406-7-11, besides interests and costs, was due from the estate of Aushootosh Day to the estate of Promothonath Day.

Previous to this report, and in the month of June 1863, Nobinmoney Dossee, Charroo Chunder Ghose, and Surruth Chunder Ghose, were deeply involved in debt and engaged in several lawsuits, and they applied for a loan of money to Messrs. Temple and Fenn, solicitors of the late Supreme Court.

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One of the members of this firm was the constituted attorney of Mr. A. B. Mackintosh, a former solicitor of the Supreme Court, who had left India in 1859, and has since resided in Scotland. Mackintosh had left a large sum of money in the hands of Messrs. Temple and Fenn for the purposes of, and with unlimited powers as to, investment, and these gentlemen agreed on behalf of Mackintosh to advance a lakh of rupees to Nobinmoney Dossee, Charroo Chunder Ghose, and Surruth Chunder Ghose. By a bond, dated the 24th of June 1863, it was declared that Sreemutty Nobinmoney Dossee, Charroo Chunder Ghose, and Surruth Chunder Ghose, "widow and executrix and grandsons and executors of Aushootosh Day," were bound to A. B. Mackintosh in the penal sum of two lakhs of rupees. The bond recited that the former persons had applied to Mackintosh to lend and advance to them, from time to time, sums of money not exceeding in all one lakh of rupees, and that he had agreed to do so upon having the repayment secured by a mortgage of several properties mentioned in a schedule to the bond, "which are the absolute property of the said Sreemutty Nobinmoney Dossee, Charroo Chunder Ghose, and Surruth Chunder Ghose, or of some or one of them," and the condition of the bond was, that if the money would be repaid on the 24th of June 1864, with interest thereon to that date at the rate of ten per cent. per annum, with quarterly rests, and if the obligees would execute when tendered a formal mortgage or mortgages of the properties detailed in the schedule, for the purpose of securing such repayment the bond would be void. In compliance with this condition, Sreemutty Nobinmoney Dossee, widow of Aushootosh Day, of the first part, and Charroo Chunder Ghose and Surruth Chunder Ghose, grandsons of Aushootosh Day, of the second part, mortgaged in fee to A. B. Mackintosh certain properties in Calcutta and the 24-Pergunnahs, which, among others, were set out in the schedule to the bond of the 24th of June 1863. The mortgage deed recited that the property had been the absolute property of Aushootosh Day; that he made a will of which he appointed his widow and two grandsons executors, and that by that will he devised all his real estate to two grandsons, [with certain exceptions not material to the present case, and not included in the schedule to the bond.] It also recited the conditions of the bond in pursu-

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e of which the mortgage was expressed to be made, and that o that date, namely, the 14th of July 1863, the advances made Mackintosh amounted to Rs. 95,533. The deed witnessed that emutty Nobinmoney Dossee, Charroo Chunder Ghose, and ruth Chunder Ghose conveyed the property to Mackintosh ording to their respective estates and interests in the pre-es.

On the 6th of August 1863, Sreemutty Nobinmoney Dossee, ow and executrix of Aushootosh Day, of the first part, and rroo Chunder Ghose and Surruth Chunder Ghose, grandsons l executors of Aushootosh Day, mortgaged in fee to A. B. ckintosh certain properties in Zillah Beerbhoom and the Per-nah Tumlook in Zillah Midnapore, also scheduled in the bond. s deed recites that one Ramdolall Day died, leaving a will by ch, after giving certain specific legacies to his relations and nds, he devised all the rest and residue of his estate to his sons Aushootosh Day and Promothonath Day, whom he made executors; that Promothonath Day and Aushootosh, as execu-s, possessed themselves of the estate of Ramdolall Day, which more than sufficient to satisfy all the debts and legacies; that mothonath Day died in December 1849, leaving a will of which appointed Aushootosh Day, Sreemutty Nobinmoney Dossee, l Sreemutty Santomoney Dossee, executor and executrices reof, who entered upon the estate; and that Aushootosh Day d on the 30th of January 1856, leaving a will, of which he ointed Sreemutty Nobinmoney Dossee, Charroo Chunder ose and Surruth Chunder Ghose, his executrix and exe-ors. The deed further recited that Aushootosh Day l devised all his immoveable properties, (with certain eptions which are not material,) to his grandsons Char-Chunder Ghose and Surruth Chunder Ghose in equal res; that Aushootosh Day had not fully accounted as executor the estates of Ramdolall Day and Promothonath Day, and t his executors were still liable in respect thereof. The deed ited the bond and warrant to confess judgment of the 24th of e 1863, the mortgage of the 14th of July 1863, of the pro-ties scheduled in the bond, all of which were the property of said Aushootosh Day, deceased, at the time of his death, and

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are now the property of the said Charroo Chunder Ghose and Surruth Chunder Ghose, as such residuary devisees under the said will of the said Aushootosh Day as aforesaid, subject to the payment of the aforesaid legacies under the said will of the said Ramdolall Day, and to the payment of the debts and liabilities (if any) of the said Aushootosh Day to the estate of the said Promothonath Day; and then proceeded to convey and assure to Mackintosh all the interest of Sreemutty Nobinmoney Dossee, Charroo Chunder Ghose and Surruth Chunder Ghose in the Midnapore and Beerbhoom property subject to redemption. The deed contained a power of sale on default of payment, and provided that in the event of the power being exercised, the proceeds should be first applied in payment of the legacies under the will of Ramdolall Day and of the liabilities of Sreemutty Nobinmoney Dossee, Charroo Chunder Ghose, and Surruth Chunder Ghose, or the estate of Aushootosh Day, deceased, to the said Promothonath Day, and then to the payment of Mackintosh's claim; and there was a further provision that the mortgagors should have power to sell or mortgage for the same purposes. On the back of the deed was endorsed an acknowledgment of the receipt of Rs. 95,533, and of the further sum of Rs. 4,467, making in all a lakh of rupees.

By a deed, dated the 20th of January 1864, the mortgaged premises above-mentioned, were charged with the further sum of Rs. 20,000 in favour of Mackintosh.

A portion of the property comprehended in the mortgage of the 14th of July 1863, known as the Church Lane property, was subject to a prior mortgage in favour of one Tariny Churn Bose. Besides the Church Lane property this latter mortgage comprehended certain property lying in the 24-Pergunnahs, known as the Munerampore property, and contained a power of sale in favour of the mortgagee. In exercise of this power, Tariny Churn advertised those properties for sale in August 1874, but withdrew the Church Lane property in consequence of a notice from Mackintosh requesting him to sell the Munerampore property in the first place. Prince Gholam Mahomed, however, offered Rs. 1,34,000 for the Munerampore property, which offer the mortgagors were willing to accept, and it was agreed that Mackintosh

should concur in the sale of the Church Lane property on receiving a second mortgage of the Munerampore property. This mortgage, which was executed on the 12th of November 1874, contains a power of sale in favour of Mackintosh, and provides that, in case the power be exercised, the sale proceeds shall be applied to the expenses of the sale and Mackintosh's claim, and the surplus handed over to the mortgagors. But a subsequent clause provides that, in the event of the property "being sold or disposed of for, or in respect of any arrears of government or zemindarree revenue or other rates or taxes as aforesaid, *or if the said legacies or debts*, then and in such case the surplus proceeds (if any) arising from such sale, which shall remain in the hands of the Collector, or other officer of Government, or other person or persons whomsoever, after deduction and satisfaction of such arrears of revenues, *legacies and debts*, shall be applicable and be paid by such Collector, &c.," to the payment of Mackintosh's claim. There was no other allusion to legacies and debts in this deed.

For the purpose of affixing the proper stamp it was declared in the deed of the 14th of July 1863, that that deed was by way of collateral security to the bond of the 24th of June 1863. A similar declaration is contained in the mortgage deed of 6th of August 1863; and in the deed of the 12th of November 1864 it is declared that for the same purpose that deed is to be taken by way of collateral security to the mortgage of the 14th of July 1863, and to the deed of further charge of the 20th of January 1864, which are expressed to be the principal securities for the repayment of Mackintosh's claim.

Up to the negociations for the loan between Nobinmoney Dossee, Charroo Chunder Ghose, and Surruth Chunder Ghose, on the one hand, and Messrs Temple and Fenn, the agents of Mackintosh, on the other, in June 1863, the solicitor, who managed all the affairs of the former parties, and to whom they owed a large sum of money, was Mr. Owen. About this time they determined to change their solicitor, and it appears from Mr. Temple's Day Book that, on the 21st of June 1863, Nobinmoney Dossee, Charroo Chunder Ghose, and Surruth Chunder Ghose executed a power-of-attorney to Messrs Temple and Fenn to manage all their suits in the High Court, one of which was the suit above mentioned of the

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adopted sons of Promothonath Day against the executors o Aushootosh Day. No cause papers at all, however, were receive by Messrs. Temple and Fenn, or even seen by them, until the 7t of July 1863, the date on which the papers and documents wer delivered up by Mr. Owen.

The plaintiffs are the executors of one Anundnarain Ghose, an the manner in which they came to have claims against th estate of Aushootosh Day is as follows:

In the year 1833, a partnership was established in Calcutt under the name of the Union River Insurance Company, for th purpose of carrying on business in Calcutta and elsewhere a insurers of goods and merchandize. The affairs of the Compan did not prosper; various suits were brought against them, and b an arrangement amongst themselves it was agreed that in consider ation of a certain sum of money to be paid by each partne four of their number should indemnify all the others against an claims which might be brought against them in respect of th Company. The names of the four shareholders were Anundnara Ghose, Aushootosh Day, Promothonath Day, and Khelut Chund Ghose; and the arrangement was entered into on the 5th of Ap 1849. Anundnarain Ghose died on the 24th day of July 18 leaving a will, of which he appointed his widow Sreemutty No runginee Dossee, his son Nogendro Chunder Ghose, and Greer Chunder Ghose, executors, and on the 12th of December 1850, obtained probate of the will from the Supreme Court. In 1 the firm of Crump, Schorn & Co. commenced an action against of the partners of the Union Insurance Co., for the amount losses endorsed on certain policies, in which they got a decr the 13th of April 1854, for the sum of Rs. 62,343-4, which was executed against and satisfied out of the estate of Anund Ghose in the hands of his executors, on the 17th day of De 1855; and on the 14th of January, the executors of Anun Ghose brought a suit in the Supreme Court for the pur obtaining, under the agreement of the 18th of Janua contribution from Aushootosh Day, Khelut Chunder Gh the estate of Promothonath Day. This suit was dismisse 13th of March 1857, without prejudice to the rights of t tors of Anundnarain Ghose to take proceedings against

sentatives of Aushootosh Day, (and the other defendants in the suit of Crump, Schorn & Co., against the shareholders of the Union River Insurance Co.,) for the purpose of obtaining contribution in respect of the Rs. 62,343-4, which was paid on the 17th of December 1855 in respect of the decree of the 13th of April 1854. Subsequently, the executors of Anundnarain Ghose, on the 30th of September 1859, instituted a suit for the purpose of winding up the Union River Insurance Co., and for obtaining contribution. A decree was passed in that suit on the 11th of May 1867, which ordered, *inter alia*, that the sum of Rs. 12,112-4-10½, with interest thereon at six percent. per annum from the 4th of July 1865 to the date of realization, should be paid to the plaintiffs by the legal representatives of Aushootosh Day, within fifteen days of service upon them of the decree. The plaintiffs, being unable to obtain satisfaction of this decree, filed a suit against the executors and the legatees under the will of Aushootosh Day, praying that certain properties might be declared liable to the payment of the plaintiffs' demand, and for an account and administration of the estate of Aushootosh Day. In this suit the plaintiffs were admitted as creditors of the estate of Aushootosh Day to the amount of Rs. 30,000, and the representatives of Promothonath Day were admitted as creditors to the amount of Rs. 2,49,000. The amount of property available was insufficient to satisfy the creditors, and it appeared that the executors of Aushootosh Day afterwards neglected to furnish any account.

Subsequently the plaintiffs having discovered that there still existed some immoveable properties—portion of the estate of Aushootosh Day, which had been mortgaged to A. B. Mackintosh by the executors of Aushootosh Day, and they brought the present supplemental suit against Mackintosh and the executors, charging that the executors had mortgaged those portions of the estate of Aushootosh Day above-mentioned in their individual capacities, and not in their character of executors, in order to raise money for their own private purposes, and not for the purpose of satisfying any claims against the estate of Aushootosh Day, and that the defendant Mackintosh had advanced his money with full knowledge of these facts, and of the debts and liabilities of the estate of Aushootosh Day.

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The plaint further stated that A. B. Mackintosh had sold and disposed of some of the properties mortgaged to him, and applied the proceeds to his own use, and the plaintiffs prayed for an account, for a declaration that Mackintosh held the moneys received as a trustee for the plaintiffs and all other the general creditors of the estate, and for further and other relief.

Evans and *Bonnerjee*, for the Plaintiffs.

Paul (A.G.), *J. D. Bell*, and *Stokoe*, for Defendant Mackintosh.

Piffard and Phillips, for the other Defendants.

The judgment of the lower Court was as follows :—

PONTIFEX, *J.* PONTIFEX, *J.* :—

The plaintiffs in this case, suing on behalf of themselves and all other creditors of Aushootosh Day, deceased, seek for the payment of their debts, to follow a portion of Aushootosh's immoveable estate, which was mortgaged for valuable consideration by the residuary devisees of Aushootosh to the defendant Mackintosh, who subsequently foreclosed the mortgage.

Aushootosh Day and Promothonath Day were the sons, devisees and executors of their father Ramdolall Day, who died many years ago, leaving by his will certain legacies, and a very considerable estate. Aushootosh and Promothonath possessed themselves of their father's estate, but neglected to pay the legacies bequeathed by his will.

In the year 1849 Aushootosh and Promothonath came to an agreement for the immediate partition of the larger part of their father's estate, and further agreed that the remainder of his immoveable estate should remain joint until the expiration of 20 years after the death of the survivor of them. But before the accounts necessary for the purposes of partition could be completed, Promothonath died, leaving a will, of which he appointed Aushootosh executor and his two widows executrices.

In 1854, the sons and beneficial devisees of Promothonath instituted a suit against Aushootosh and the executrices, to establish and carry out the partition, to take the necessary accounts, and for the administration of Promothonath's estate, and on the 28th of February 1855, a decree was made for those

purposes, and by it Aushootosh was, by consent, appointed receiver, upon his own personal security, of Promothonath's estate and of his share of Ramdolall's unpartitioned property. Pending the taking of those accounts, Aushóotosh died on the 30th of January 1856, having by his will in effect devised his residuary estate to the defendants Charroo Chunder Ghose and Surruth Chunder Ghose, and having appointed them and the defendant Nobinmoney Dossee, his executors and executrix, against them, the suit was revived, but it was not until the 7th of October 1863, subsequent to the mortgage with which we now have to deal, that the Master made his report and thereby found that a sum of Rs. 1,32,406-7-11 was due from Aushootosh as receiver and executor to the estate of Promothonath. The decree, confirming this report and directing payment of the amount, was not passed until the 29th August 1864.

Aushootosh Day left residuary estate of very large value. So far as the evidence in this suit shows, his only liabilities at his death were so much of the above-mentioned sum of Rs. 1,32,406-7-11, as was due at his decease, his share of his father Ramdolall's legacies, and a liability to the present plaintiffs which arose under the following circumstances:—

A suit had been filed in the lifetime of Aushootosh against him, and the predecessors in title of the plaintiffs and other defendants in respect of a joint liability, in connection with a certain Insurance Company, called the Union Insurance Company, and a decree had been made on the 13th April 1854 in favor of the plaintiff in that suit, which decree was executed exclusively against, and satisfaction thereof obtained from, the predecessors of the present plaintiffs.

The present plaintiffs, in 1859, instituted a suit for contribution against the representatives of Aushootosh and 49 other defendants, but it was not until the 11th of May 1867 that they obtained a decree, under which the representatives of Aushootosh were made liable for his contributive proportion of the amount which the present plaintiffs had paid under the before-mentioned execution proceedings. This amounted, so far as I can gather from the decree, to about Rs. 15,342, with interest at the rate of 6 per cent. from the 4th of July 1865. But a considerable part

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of the Rs. 15,342 was itself interest which had accrued since the plaintiffs had satisfied the joint decree in the matter of the Insurance Company, so that at the date of the death of Aushootosh, the liability of his estate in this matter was probably very small. The present plaintiffs, being unable to execute this decree against Aushootosh's representatives, instituted another suit in 1872, for the administration of Aushootosh's estate, for the purpose of satisfying their former decree; and in that suit have been found creditors of Aushootosh's estate for principal and interest to the amount of about Rs. 30,000. The estate recovered in that suit, and now under the control of the Court, being greatly insufficient to pay the amounts due to the estate of Promothonath, and the present plaintiffs, the latter have instituted this suit as supplemental to their suit of 1872, for the purpose of following part of Aushootosh's estate in the possession of the defendant Mackintosh, and having it administered in their suit of 1872.

The manner in which the property sought to be recovered and administered came into the possession of the defendant Mackintosh was as follows:—The defendant Mackintosh had formerly been a solicitor of the Supreme Court in partnership with a Mr. Temple, but he had retired, and left India, and had appointed Temple his agent and attorney with full power. At the beginning of June 1863, Temple had over a lac of rupees of Mackintosh's in his hands for investment. At that time, 7½ years after Aushootosh's death, Charroo and Surruth, his residuary devisees, had become greatly involved, and were engaged in numerous suits, in some of which decrees against them were in course of execution, their solicitor was a Mr. Owen, who had possession of all their title deeds and cause papers, with a large demand against them for costs on his own account.

Under these circumstances, Temple arranged in June 1863 to advance them a lac of rupees out of Mackintosh's moneys, upon the security of a bond and mortgage. But all their papers and documents were in Mr. Owen's hands, and he refused to give them up, or even let them be seen, without being first paid Rs. 51,450 down, and having Rs. 10,000 further placed in deposit as a security to him for the full discharge of his demands

and lien against Charroo and Surruth. But there was a pressing demand under an execution of one Manick Chunder Sing then in the hands of the Sheriff which it was necessary to meet at once.

On the 24th June Nobinmoney, Charroo and Surruth described as widow and executrix and the grandsons and executors of Aushootosh, executed a bond in favor of Mackintosh in the penal sum of two lacs of rupees. In the recitals of this bond it was stated that the money to be advanced was to be further secured by a mortgage (not two mortgages) of properties described in the schedule, "which are the absolute properties of Nobinmoney, Charroo and Surruth, or some or one of them." On the same 24th of June a cheque for Rs. 35,000 was paid to the Sheriff in compromise of Manick Sing's execution. On the 7th of July a cheque for Rs. 51,450 was paid to Mr. Owen, who thereupon gave up to Temple the documents of title and cause papers belonging to Charroo and Surruth, but only upon the condition that Temple should hold an additional Rs. 10,000 for the surplus (if any) of Owen's claim. It was, therefore, not until after Rs. 86,450 had been actually paid that Temple became possessed of any documents which could give him even constructive notice of the position of Aushootosh's affairs. No evidence has been given as to how the Rs. 10,000 held on deposit was afterwards applied, and I must therefore assume that that sum duly came to the hands of Charroo and Surruth without notice to Mackintosh of its ultimate application by them. In addition, Rs. 1,000 was paid to a broker as commission, and the application of the residue of the lac is unaccounted for by the evidence.

On the 14th July 1863, a mortgage was executed in favor of Temple for a lac of rupees. It was made by Nobinmoney, Charroo and Surruth, described as widow and grandsons of Aushootosh. It recited that Mackintosh had already advanced 95,533. By the proviso for redemption, Mackintosh was to convey to Nobinmoney, Charroo and Surruth their heirs, representatives and assigns in such manner as they should direct.

I may observe here, that although Charroo and Surruth were legally entitled as residuary devisees under the will of Aushootosh, the will contained a clause directing that, during Nobin-

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money's life, they should not deal with the property without her consent, she was therefore a necessary party to the mortgage.

By a subsequent deed, dated the 6th of August 1863, executed some time after the Rs. 95,533 had been advanced, Nobinmoney, Charroo and Surruth, described as widow and executrix and grandsons and executors of Aushootosh, mortgaged, by way of further security, to Mackintosh additional property called the Beerbhoom and Tumlook properties. This mortgage deed recites Ramdolall's will, and the fact that certain legacies thereby bequeathed still remained unsatisfied, and also that Aushootosh Day in his lifetime did not fully account for the estate of Promothonath, and that Nobinmoney as executrix, and Charroo and Surruth as executors and residuary devisees of Aushootosh, were still accountable in respect of the aforesaid particulars. It further recites the bond and the first mortgage as comprising "certain houses, lands, hereditaments and premises, other than the hereditaments and premises thereinafter described, and all which said several hereditaments and premises respectively were the property of the said Aushootosh Day, deceased, at the time of his death, and are now the property of the said Charroo and Surruth as such residuary devisees as aforesaid, subject to the payment of the aforesaid legacies under the will of the said Ramdolall Day, and to the payment of the debts and liabilities (if any) of the said Aushootosh Day to the estate of the said Promothonath Day, deceased, as aforesaid." The deed further recites that Rs. 95,533 had already been advanced. By this deed the Beerbhoom and Tumlook properties were conveyed to Mr. Mackintosh, with a power of sale on default being made in payment of the Rs. 1,00,000. The trusts declared of the purchase moneys under any sale were: *first*, to satisfy the legacies under Ramdolall's will; *secondly*, to satisfy such sum or sums of money (if any) as should be found due from Nobinmoney, Charroo and Surruth or the estate of Aushootosh to the estate of Promothonath, and next to pay Mackintosh; and, lastly, to pay the surplus (if any) to Nobinmoney, Charroo and Surruth, or as they should direct. And Nobinmoney, Charroo and Surruth covenanted that they had good right to grant the premises subject only

to the legacies of Ramdolall and the said liability (if any) to the estate of Promothonath.

The bond and the two mortgages were covered by one stamp, and so far they were treated as a single security.

The second mortgage, it is to be observed, refers to no liabilities of Aushootosh's estate, except Ramdolall's legacies (which have since been satisfied, and may therefore be disregarded) and the liability to Promothonath's estate. It does not refer to the debt of the plaintiffs, or any other debt owing by Aushootosh's estate. And it is further to be observed that the liability to Promothonath's estate, which is always referred to as the liability (if any), was two-fold, viz., a liability on account of Aushootosh himself, and a liability on account of Nobinmoney, Charroo and Surruth personally. This latter liability could in no way affect the properties except under the trusts of the second deed,—the properties comprised in which are not now in dispute, having been recovered for the benefit of Aushootosh's creditors.

Mr. Mackintosh subsequently, about the year 1868, obtained by one decree a foreclosure of the properties comprised in both mortgages, but owing to circumstances, to which it is not necessary to refer here, the Tumlook property is now in the possession of the receiver in the administration suit of Aushootosh's estate, for the benefit of his creditors, and the Beerbhoom property has been sold and out of it Ramdolall's legacies have been paid, and no portion of its proceeds has come into Mackintosh's possession.

Under the circumstances before stated, the present plaintiffs, who did not obtain their decree against the representatives of Aushootosh until 1867, four years after the mortgage to Mackintosh, insist now, more than 13 years after the date of that mortgage, and more than 20 years after the death of Aushootosh, that they have the right to follow the property comprised in the first mortgage to Mackintosh, and have it applied in payment of their debt and interest since 1865; and they found their claim *first*, on the express notice given to Mackintosh in the second mortgage, that Aushootosh's estate was still liable for Ramdolall's legacies and Promothonath's claim, which, they argue, ought to have put him on further enquiry; and, *secondly*, on the constructive notice with which, they say, he must be affected, though

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Temple who acted for, and was the solicitor of, both parties in the mortgage transaction.

The question how far lands purchased from a Hindu devisee are liable in the hands of the purchaser for the testator's debts, seems to me to stand pretty much on the same footing as a similar question would under the present English law. In English law the liability did not exist until it was expressly created by Statute 3 and 4 Will. and Mary, c. 14. Prior to that Statute, freehold lands of inheritance which descended to the heir, were, by the common law, assets for the payment of the ancestor's debts by specialty, as by bond or covenant in which the heir was named. But when general testamentary power over freehold lands of inheritance was conferred by the Statute of 32 Henry VIII, c. 1, the ancestor acquired power by disposing of the land by will, to deprive his specialty creditors of their common law right to be paid out of it, as the devisee was neither at law or in equity liable to the payment of the testator's debts in respect of the land devised. The devisee, in fact, took the same position as an alienee *inter vivos* from his testator. The heir-at-law also, to whom the land descended, could always defeat the creditors of his ancestor, by alienating the lands before suit by the creditors, although in equity perhaps (though this is doubtful) he might have been responsible for the value of the land alienated. To remedy this Statute 3 and 4 Will. and Mary, c. 14, was passed, by sections 5 and 7 of which Statute, heirs and devisees, in case they alienated, were made answerable to the value of the lands so alienated, with a saving that lands *bonâ fide* aliened before action brought, should not be liable to execution by the ancestor's creditors. That statute was re-enacted and extended by 1 Will. 4, c. 47; and by 3 and 4 Will. 4, c. 104, lands were made assets, to be administered in Courts of Equity, for the payment of simple contract as well as specialty debts, and heirs and devisees were made liable in equity to the same suits by all creditors, as before the passing of the Act they were liable to at the suit of creditors by specialty in which the heirs were bound. The result of these Acts in England has been in effect to put a construction on the words "*bona fide* aliened before action brought," which enable [redacted] creditors of the ancestor or testator to follow his lands into

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the possession of a purchaser from the heir or devisee if it can be proved that such purchaser knew: (1) That there were debts of the ancestor or testator left unsatisfied; and also (2) that the heir or devisee to whom he paid his purchase-money intended to apply it otherwise than in the payment of such debts. But a purchaser, ignorant on either of these points, has a safe title, for no duty is cast upon the purchaser from the heir or devisee to enquire whether there are any debts of the ancestor or testator, or to see to the application of his purchase-money. The decision in *Corser* vs. *Cartwright*, L. R., 7 E. and I. App., 731, is an authority for this, even in the far stronger case where there is an express charge of debts by the testator on the devised estate, at least when the devisee is also executor, for the Lord Chancellor cautiously confined his judgment to the case before him. And it is also an authority to show that, even where there is an express charge of debts, the burden of proof is entirely on the creditor to show that the purchaser from the devisee had notice that the latter intended to misapply the purchase-money.

That being the state of the law in England, is there any material difference between it and the law which ought to be applied in India? In England, as we have seen, specialty creditors had a common law right against the descended estate until alienation. That right was partially destroyed by the statutory power of devise given to the owners of property. And it was again restored by statute, and extended against alienees who had not purchased *bonâ fide*.

In India the general creditors seem to have had no higher rights than the specialty creditors had under the common law in England. For if they had had a charge on the descended land, it would have been impossible for the heir to deal with it without the concurrence of all the creditors, and in early times, therefore, it would have been impossible to make any title. The ancestor could in his lifetime have aliened the lands without the concurrence of his creditors, and in the absence of any positive precept, or express authority to the contrary, the words of Lord Justice MILLISH in the *British Mutual Investment Company* vs. *Smart*, L. R. 13 Ch., App., 578, would seem applicable, when he said: "In fact I cannot see why a man should be more liable in

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respect of the debts of his ancestor *qud* lands, than he is liable in respect of his own debts." A Hindu being thus competent up to the day of his death to alien his lands without regard to his creditors, a disposing power by will, unknown in primitive times, came into existence by a kind of evolution or development of the law, and it would be natural that by the same process the devisee should, with respect to his testator's creditors, be saddled with the same liabilities as the heir has theretofore been saddled with in respect to the creditors of his ancestor.

This principle has been recognised in Act VIII of 1859 and Act X of 1877, both of which Acts, however, are intended only as Codes of Procedure. Sections 208, 210 and 211 of Act VIII of 1859 deal with the subject; the former section using the word "representative" and the other sections the words "legal representative," but whether any distinction between these terms was intended it is not necessary to consider. In the Act of 1877 the corresponding sections are 252 and 234, in each of which the words "legal representative" are used. But though this Act was passed after the Hindu Wills' Act, by section 179 of which a distinct meaning is given to the words "legal representative," namely, an executor or administrator with the will annexed, in whom all the property of a testator vests, I think sections 252 and 234 are intended to apply to the heir of an intestate. The language of section 252 of the present Code, and of section 208 of Act VIII of 1859, is scarcely satisfactory so far as it applies to immoveable property; for it cannot very well be said of such property that it cannot "be found." Probably these words were intended to confine the procedure under the sections in question to property remaining in the possession of the legal representative, leaving the creditors to follow property improperly alienated by the legal representative by a separate suit. It could not be intended that property aliened should be subject to execution in a suit to which the alienee was not a party.

But neither in the case of the heir or of the devisee has there been a distinct statutory provision as in England, that lands may be followed in the hands of a purchaser, unless he is a *bonâ fide* alienee. That, however, being a principle of natural equity, has been applied by the Courts to the cases of purchases from Hindu

heirs and devisees, so as to make the law in effect accord with English law as it now exists. But certainly there seems to me no authority for holding that the creditor of a Hindu is in any better position than the creditor of an English ancestor or testator.

If then this is a correct statement of the law, how does it apply to the facts of the present case. Mr. Mackintosh himself being out of the country had of course no personal knowledge whatever that the estates mortgaged to him were under any liability on account of Aushootosh's debts. And the only liabilities referred to in the second mortgage of August 1863 were the liabilities to Ramdolall's legatees and the liability (if any) to the estate of Promothonath. That deed gives no notice, either express or implied, that any other debts were owing by Aushootosh's estate, and except there was any constructive notice through Mr. Temple by which Mr. Mackintosh could be affected, a purchaser or mortgagor from Aushootosh's residuary devisees' seven and half years after his death might fairly have supposed that Aushootosh's debts (if any) had been satisfied. Indeed the very fact that the liability to Ramdolall's legatees and to the estate of Promothonath was expressly mentioned would raise a presumption that enquiry had been made and all other liability either denied or concealed. And so far as I can discover from the evidence, there is nothing to show, with the force of proof, that even the liabilities to Ramdolall's legatees, and to Promothonath's estate were known to Mr. Temple before Rs. 95,000 out of the lac had been advanced. It is true that for the purposes of the stamp law the bond and the two mortgages are treated as one transaction, but that would equally have been the case if the second mortgage had not been thought of until months after the first mortgage had been executed. As a further security for an amount already secured, it would require no additional stamp, and it is to be observed that the recital in the bond speaks only of one mortgage, though the condition speaks of a formal legal mortgage or mortgages, which words, however, seem to me to be used merely by way of common form. Looking at the bond and mortgage of July alone, I cannot conclude that at the time they were respectively executed, any mortgage, in the

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form of the mortgage of August 1863, was in the contemplation of the parties. This is to some extent borne out by the terms of the final clauses to the first mortgage which relates to the stamp. If there was any question now about the Beerbhoom and Tumlook properties, it might, however, be doubtful whether the deed of August is sufficiently stamped, so far as it created trusts in these properties for the legatees of Ramdolall and the representatives of Promothonath.

Upon the whole, therefore, I am of opinion that when Rs. 95,000 was advanced, it has not been proved that Mr. Temple was actually aware that the estate of Aushootosh was liable even in respect of the legatees of Ramdolall or the claim of Promothonath's estate; and with respect to Rs. 5,000, the remainder of the lac, there is no evidence to show that it was misapplied by the mortgagors or applied to their own personal necessities, or that Temple knew of their intention to misapply it, for the evidence deals only with the Rs. 86,450. The burden of proof of the existence of such notice lies entirely on the plaintiffs, and in my opinion they have failed satisfactorily to establish it.

The language of Lord CAIRN'S in *Corser* vs. *Cartwright* is very applicable to the present case. He said in that case: "The burden of proof being entirely on the applicant, every probability of the case going to this, that as the mortgagee would not willingly lend his money upon a security, that would be defective, so his solicitor, having no object or interest in the matter leading him to a different line of conduct, would not allow his client to advance money upon a bad security, and thereby make himself liable to an action by his client for negligence. The case just cited is also important, as clearly showing that for a purchaser to be affected with constructive notice through his solicitor, the latter himself must have *actual* notice, and cannot be treated as possessing the latent knowledge of his client, the mortgagor. For in that case the solicitor had been the solicitor of the testator, (who had only been dead *one* year), and of his acting executor, the mortgagor, and must have known that the testator's debts had not been satisfied, and that case was infinitely stronger in one direction than the present, for in that case there was an express charge of debts by the testator.

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I repeat then that I am of opinion that the plaintiffs have failed to prove, as they were bound distinctly to prove, that at the time the Rs. 95,000 was advanced, Temple had actual positive notice of the facts that the legatees of Ramdolall and the representatives of Promothonath had claims against the estate of Aushootosh, and therefore, so far as the first mortgage deed is concerned, Mackintosh was a *bonâ fide* alienee. The plaintiffs adduce no distinct positive evidence, but rest their case on inference and presumption. And in my opinion it would be extremely dangerous at this distance of time, when Temple is dead, to give any weight to possible inferences on presumptions.

It is further to be remembered that the legatees of Ramdolall have been satisfied; and that at the date of these mortgages the liability, and in the second mortgage deed it is always called the liability (if any) to Promothonath's estate was unliquidated, and consisted of a two-fold responsibility, viz., a responsibility as executor, and a responsibility as receiver, and if it was not known that Aushootosh had been appointed receiver without security, and this unusual procedure in an infant's suit would not be presumed, it might have been assumed that at least a portion of this liability was properly secured.

So far as the plaintiff's claim is concerned, even if inference and presumption could be relied upon as proof, I think it would be impossible to hold that Mackintosh was not a *bonâ fide* alienee. The Rs. 95,000 was advanced before Temple got the papers from Owen, and it was only from the cause papers in the plaintiff's suit for contribution that Temple could have learnt the liability of Aushootosh's estate in that particular, nor does it appear that there was any activity at the time in relation to that suit, and it was not until four years after the mortgages that the plaintiffs obtained a decree. As the plaintiffs have failed to establish by distinct evidence that Mackintosh had either actual or constructive notice at the date of the first mortgage, that the estate of Aushootosh, who had been dead 7½ years, was in any way under liability, and as they have also failed to establish that either Temple or Mackintosh had notice of the intended misapplication (if misapplication there was) of the Rs. 5,000, the residue of the lac advanced after the date of the second mortgage, I am of opinion that they

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are not entitled to follow the property comprised in the first mortgage. And with respect to the further advance of Rs. 20,000, afterwards made by Temple for Mackintosh, and by a deed of 20th January 1864, secured on the premises comprised in the mortgage of July 1863, a like observation applies; there is no evidence to show either that this Rs. 20,000 was misapplied, or that Mackintosh or Temple had notice that the mortgagors intended to misapply it.

There was a question which was raised only on the conclusion of the arguments in this case, which creates some difficulty, and to which I must refer. The first mortgage deed of July 1863 included certain property in Church Lane, Calcutta, which was then already with other property at Monerampore under mortgage to one Tariny Churn Bose for Rs. 1,32,000. This mortgage Mackintosh would have been entitled to redeem. It appears that in 1864 Tariny Churn Bose was preparing to sell the Church Lane property, and that when this came to Mackintosh's knowledge he requested Tariny Churn to sell the Monerampore property in the first instance. But inasmuch as Prince Gholam Mahomed had offered himself as a purchaser for the Church Lane property at the price of Rs. 1,45,000, the mortgagors requested Mr. Mackintosh to release the Church Lane property, and in lieu thereof to take a mortgage upon the Monerampore property, and this arrangement having been agreed to, by a deed dated the 12th of November 1864, Monerampore property was mortgaged to Mackintosh (but subject to Tariny Churn's mortgage) as a further security for the 1,20,000 secured by the mortgage of July 1863 and the further charge of January 1864. In this deed of the 12th November 1864 is contained a clause providing for the destination of the surplus purchase monies in the event of a sale by the Collector for Government revenue. That clause is copied from a similar clause in the deed of August 1863, which dealt with the Tumlook and Beerbhoom properties, and provides that the surplus monies in the hands of the Collector shall be applied "after payment of the said legacies or debts" in discharge of Mackintosh's mortgage debt. No other reference is made by the deed to Aushootosh's debts, and it is clear that the introduction of the words "legacies and debts" in this deed was a scissors and

paste blunder of the draftsman. It is, however, now relied on by the plaintiffs as charging any proceeds that Mackintosh may have derived from the Monerampore property with the liability in priority to his own charge of paying such debts.

It is alleged on the part of Mackintosh that at the utmost he never derived more than Rs. 5,000 from the proceeds of Monerampore. But however this may be, it seems to me that before the plaintiffs could claim an interest in such proceeds, they would have to prove that the monies advanced by Tariny Churn were misapplied by the mortgagors and misapplied to his knowledge, and to the knowledge of Mackintosh. For Mackintosh would have the right to the benefit of Tariny Churn's security, so far as the latter was paid off out of the purchase monies of the Church Lane property. The evidence as to this matter is, however, so defective that I am of opinion the plaintiffs have made no case for making Mackintosh account in respect of the Monerampore property.

Possibly, the representatives of Promothonath might have some claim upon the proceeds of Monerampore, but this might depend upon whether the deed was sufficiently stamped to cover their claim as well as that of Mackintosh. But even if Promothonath's representatives were entitled to urge any such claim, I think the present plaintiffs have no right to soil under their colors or to claim on their own behalf any benefit from such proceeds.

My conclusion on the whole case, therefore, is that the plaintiffs' suit fails and must be dismissed with costs. But, I wish it to be understood that in so deciding I do not intend to infringe the rule that when a purchaser or mortgagee has actual notice, or constructive notice through his solicitor, that the ancestor or testator of his vendor or mortgagor left debts still remaining undischarged, and that the vendor or mortgagor improperly intends applying the purchase or mortgage monies to his own purpose, notwithstanding the existence of such debts, a conveyance or mortgage under such circumstances would be fraudulent, and the purchaser or mortgagee taking under it would be liable to be treated as an actor in the fraud, and the property comprised in it would continue in his hands subject to the liabilities to which the purchaser or mortgagee had notice it was liable in the hands of the executor and devisee.

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Against this decision the plaintiffs appealed.

Woodroffe, Evans and *Bonnerjee,* for Appellant.

Paul (*A. G.*), *J. D. Bell* and *Stokoe,* for Respondent Mackintosh.

Piffard and *Phillips,* for other Respondents.

Judgment.

The following judgments, on appeal, were delivered by the Court (1) :—

WHITE, *J.*

WHITE, *J.* :—

This suit is instituted by persons who are creditors of the estate of Aushootosh Day on behalf of themselves and all the other creditors of that estate against the defendant Mackintosh, and also against Charroo, Surruth and Nobinmoney, the executors and executrix of Aushootosh Day's will. Its object is to follow in the hands of the defendant Mackintosh, certain property which originally formed portion of the testator's estate, and was mortgaged to Mackintosh partly by the defendants Charroo and Surruth, and partly by them and the other defendant, Nobinmoney Dossee. The plaintiffs allege that Mackintosh took the mortgages with notice that certain suits were pending in which they and others claimed to be creditors of Aushootosh Day, and also with notice that the debts due from his estate were unpaid, and that the mortgage money was intended to be applied by the borrowers to their own private purposes and not in a due course of administration. The prayer of the plaint has a wider object than what I have just stated, and extends to other property alleged to be in the hands of the executors and executrix themselves. The issues, however, which were settled in the suit, relate solely to property, the subject of mortgages to the defendant Mackintosh, and the case was argued both here and, apparently, in the Court below solely with reference to such property.

The mortgages sought to be impeached by this suit were made on the 14th of July and the 16th of August in the year 1863, more than thirteen years before the present suit was brought, which was filed on the 23rd of November 1876.

Several issues were raised on behalf of the defendant Mackintosh, of which the third is, whether the plaintiffs are barred by

(1) GARTH, *C.J.*, and WHITE, *J.*

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w of limitation. The law of limitation to be applied is Act
1871, and the defendant Mackintosh contends that the
barred by article 118 of the 2nd schedule to that Act.
plaintiffs, on the other hand, contend that taking the circum-
s under which the mortgages were made to be such as are
d in the plaint—an assumption which I make for the purpose
posing of the question of limitation—the present suit is
t from the operation of the law of limitation by virtue of
n 10 of Act IX of 1871.

t section enacts that "no suit against a person in whom
rty has become vested in trust for a specific purpose or
st his representatives for the purpose of following in his or
hands, such property shall be barred by any length of time."
xplanation is appended to that section which is as follows:—
urchaser in good faith, and for value from a trustee, is not his
entative within the meaning of this section."

s plaintiffs contend that upon the facts assumed, the defendant
intosh is a representative of a trustee within the meaning
at section. Before considering whether the defendant is
representative, it will be necessary to determine the position
y Charroo, Surruth and Nobinmoney with reference to the
of Aushootosh Day. The will of the testator appoints these
defendants executors and executrix; and they have taken
robate. It contains no specific bequest to them as exe-
s, nor any devise to them of property for the purpose of
g debts, nor indeed does it contain any direction that the
or's debts should be paid, or, as far as I am aware, any allu-
to debts; but it bequeaths several legacies and gives the
e of all the testator's real and personal property, after
ying the legacies, to his grandson by daughters, a class
in 1863 was, and is still, represented by Charroo and Surruth.
admitted that no property of the testator vested in the
ary sense of the word, in the three defendants by virtue of
appointment as executors; that, being Hindoo executors,
were managers only of the testator's estate, and as such, had
a power to sell or mortgage the same in cases of necessity, of
payment of debts would, of course, be one. It is also
ted that Charroo and Surruth in their character of residuary

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devisees did not hold any part of the residue in trust for any purpose. But it is argued that, inasmuch as Charroo and Surruth were, to the knowledge of the defendant Mackintosh, executors as well as residuary devisees, they were substantially in the same position as English executors who, by their office, take a property in the assets for the purpose of applying them in a due course of administration. Assuming that to be so, the broad question arises, whether executors, in whom a property in the assets is vested by virtue of their appointment, but to whom no property is specifically or expressly bequeathed for the purpose of paying debts, are, as regards the creditors of their testator, persons in whom property is vested in trust for a specific purpose, within the meaning of section 10 of Act IX of 1871.

No doubt, executors are in almost every respect considered in Courts of Equity as trustees by virtue of their office (2 Williams on Executors, pp. 1658 and 1852). But the obligations which are thus imposed upon executors are irrespective of whether any property has or has not been bequeathed to them by the will in trust for the payment of debts or legacies. Did the Legislature intend that the word trustee, in section 10, should be co-extensive in meaning with the same word as used in Courts of Equity? I think not. It has been already held by this Court in *Kherodemoney Dossee* vs. *Doorgamoney Dossee* (3 C. L. R., 315) that the words "vested in trust for a specific purpose" are used by the Legislature in a restrictive sense, and that they limit the character and nature of the trust attaching to the property which is sought to be followed. A consideration of the words themselves shows that this must be so.

In ordinary parlance "specific" means something "specified" or "particularised;" it also means something "definite," and is used in opposition to what is "general" and "undefined." But in all its ordinary uses the word "specific" points to a distinction or difference, or distinguishing feature which marks off the thing described from a larger class of similar things. This distinction is illustrated by the cases in which the Courts of Probate have held that, where the whole personal estate is left to a trustee in trust for a specific purpose under a will, in which no executor is named, such trustee is not entitled to probate as executor accord-

ing to the tenor. The ground of the refusal is, that the trustee has only the power to apply the estate, as directed by the trust and not the general power to administer the estate, which belongs to the office of executor (*In the goods of Jones*, 2 Sw. and Tr., 155, citing *Boddicot* vs. *Dalzeel*, 2 Lee, 294). Although the phrase referred to is to my mind clearly restrictive, I admit that it is not easy to draw the line between what trusts are and what are not trusts for a specific purpose, if the attention is confined to discovering the meaning of the Legislature from that phrase alone. But it appears to me that the solution of the question, where the line is to be drawn, must be sought for in the context of the Act of Limitation; and that the key to the solution is to be found in articles 133 and 134 of the 2nd schedule of the Act, which is incorporated with it by section 4. Articles 133 and 134 prescribe a period of limitation when a suit is brought to recover moveable or immoveable property, conveyed in trust, deposited, or pawned or mortgaged and afterwards bought from the trustee, depository, pawnee or mortgagee in good faith and for value. Such a suit is in effect a suit to follow the trust property in the hands of a purchaser; and where the purchase is made in good faith, the plaintiff is barred by the lapse of twelve years from the date of the purchase. But where the purchase is not made in good faith, the twelve years' limitation does not apply. What then in the latter case is the period of limitation prescribed by the Act, or does the Act prescribe any period of limitation in the latter case? Section 10 furnishes the answer which is, that time shall be no bar in such a case: in other words, that such a case shall be exempt from the operation of the law of limitation. Unless we construe section 10 as applying to such a case, the Act is silent on the subject and leaves that case undisposed of. The language of section 10 is satisfied by giving it that application; and I think upon the true construction of the Act, section 10 was intended to have that application. In my opinion, therefore, the phrase, "vested in trust for any specific purpose," is a compendious form of expression for trust of the nature and character mentioned in articles 133, and 134, namely, such as attach to property *conveyed in trust*, *deposited*, *pawned*, or *mortgaged*.

On the other hand, if we were to construe section 10 as mean-

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ing that the assets of a testator when in the hands of an executor, should be considered as vested in him in trust for a specific purpose merely by virtue of his office, it seems to me that we should be attributing to the Legislature in some respects a strange inconsistency; for the creditors of the estate are, by the operation of various articles of schedule II of the Act, barred from prosecuting their claims after the lapse of certain periods, commencing from the date of the contract or the arising of the cause of action. Similarly a legatee or the claimant of a distributive share of the moveable property of a testator must pursue his remedy within twelve years from the time when the legacy or share becomes payable or deliverable. To give to section 10 the construction contended for by the plaintiffs would be tantamount to supposing that the Legislature has declared in the same breath that the particular claimants mentioned above, if they desired to be satisfied out of the assets of a testator, must sue the executors within a limited time, or may sue them at any time they please.

For the above reasons I am of opinion that the property, the subject of Mackintosh's mortgages, was not vested in or held by the three other defendants for any specific purpose within the meaning of section 10 of the Limitation Act. It becomes unnecessary therefore to consider whether the defendant Mackintosh was, within the meaning of that section, a representative of those persons.

As the suit is not exempt from limitation by the 10th section, the next question to be considered is, what is the period of limitation? The object of the suit is, as I have stated, to follow the assets of Aushootosh Day's estate in the hands of the defendant Mackintosh.

The plaint prays that the mortgages be declared void as against Aushootosh Day's creditors, and for relief consequential upon such a declaration.

In my opinion the article applicable to the present suit is article 118, this being a suit for which no period of limitation is provided elsewhere in the 2nd schedule. The time when the period begins to run under this article is when the right to sue accrues.

This suit was brought on the 23rd of November 1876. The plain-

tiffs allege that the cause of action arose in November 1872, and their Counsel stated that the right to bring this suit first accrued on the 22nd of that month when the plaintiffs obtained the administration decree which was made supplemental to the suit brought by the two first plaintiffs against John Bartlett and others.

I cannot accept this view. The administration decree of 1872 appears to me to have nothing to do with the question of limitation. The present suit is one on behalf of all the creditors of Aushootosh Day, several of whom were in existence and unsatisfied at the time when the mortgages now sought to be impeached were made. I think that the right to bring against the defendant Mackintosh such a suit as the present one, first accrued in 1863, when these mortgages were executed.

If a *devastavit* was then committed at which the defendant Mackintosh assisted, the creditors of Aushootosh Day had then the right to impeach the mortgages, and file a suit for the purpose of following the property in the hands of Mackintosh. It was not through any fraud or concealment on the part of the defendant Mackintosh that the creditors of Aushootosh Day omitted to file their suit till thirteen years afterwards.

The plaintiffs, however, allege that two of their number personally could not have joined in suing in 1863, because although they had brought their suit for contribution as far back as 1859, the debt due to them from the estate of Aushootosh Day in respect of such claim, was not ascertained by a decree of this Court until 1867. This appears to me to make no difference; and even if it did, the plaintiffs have not brought their suit within even six years after they had obtained that decree; nor do they assert that they were kept from knowledge of their rights by means of fraud to which the defendant was party or privy.

On the whole I am of opinion that the suit is barred, and I would therefore dimiss the appeal.

GARTH, *C.J.* :— GARTH, *C.J.*

I am also of opinion that the plaintiffs' claim is barred by limitation.

Their debt against the estate of Aushootosh Day, upon which their right to bring the present suit depends, is founded upon a

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decree for about Rs. 15,342 which they obtained agains representatives of that estate on the 11th of May 1867.

Having been unable, as they allege, to realize their debt o Aushootosh Day's property, they brought this suit on the of November 1876, on behalf of themselves and the creditors of his estate, praying for a declaration by this C that certain estates which were mortgaged to the defen Mackintosh so long ago as the month of July 1863, and mortgage of which has since been foreclosed, are now liab the hands of Mackintosh to satisfy their own debt and thos the other creditors; and praying that such estates may be administered in a suit which was instituted in the year 1872 the administration of Aushootosh Day's estate.

The representatives of that estate, who are made defend in this suit, are Charroo Chunder Ghose, Surruth Chunder G and Sreemutty Nobinmoney Dossee, who were named as cutors and executrix of Aushootosh Day's will, and Cha Chunder and Surruth Chunder were also his residuary lega and as such, entitled to the property in question, subject to payment of his debts.

Aushootosh Day died on the 30th of January 1856, posse of considerable property; but after his death Charroo Chu and Surruth Chunder became much involved, and in June they and Nobinmoney arranged with a Mr. Temple, who then acting in this country for the defendant Mackintosh, to them Rs. 1,00,000 of Mackintosh's money upon the securit a bond and a mortgage of certain immoveable property, inclu that which is the subject of this suit.

This agreement was subsequently carried out by means bond and two mortgages, one dated the 14th of July, by wh the estates in question were conveyed, and the other dated 6th of August.

The mortgages professed to be made by Charroo Chunder Surruth Chunder in their character of residuary legatees; Nobinmoney was also necessarily made a party to them, bec by a clause in Aushootosh's will, the property could not be d with during her life without her consent.

The plaintiffs say that Temple, who acted for Mackintosh,

notice of the plaintiffs' claim when the mortgages were made, and how far he had such notice is one of the main questions in this case; but for the purpose of deciding the point of limitation, I will take it, that the plaintiffs' statement is in that as well as in other respects, true, and that the notice which Temple had, was also notice to Mackintosh.

In the year 1868 Mackintosh commenced foreclosure proceedings, and on the 14th of April and the 10th of July 1870 he obtained orders, foreclosing both mortgages; but the estates, which are the subject of this suit, were comprised in the first mortgage only, and Mackintosh has been in possession of them ever since the foreclosure.

The plaintiffs' case is, therefore, that although the amount of their claim was not ascertained until 1867 (nearly four years after the first mortgage) they had a right, in common with the other creditors of Aushootosh Day, to treat the estates comprised in that mortgage as subject to the payment of Aushootosh's debts, and to bring this suit, for the purpose of enforcing their charge in that respect.

But then, assuming that they are right in this, the defendants say that the plaintiffs might have brought their suit in 1863, when the mortgage was made, or at any rate in 1867 when the amount of their debt was ascertained; and that as this is a suit for which no special period of limitation is provided by the Act in 1871, it comes under article 118 of the schedule, and should have been brought within six years of the time when the cause of suit arose.

To this the plaintiffs say :—

1*st*.—That this is in substance a suit for possession of immoveable property or of an interest therein, within the meaning of article 145; and consequently that the period of limitation is twelve years from the time when the possession of the defendant became adverse to that of the plaintiffs;

2*ndly*.—That this is a case coming within section 10 of the Limitation Act, inasmuch as the property has become vested in the defendant Mackintosh in trust for a specific purpose, that is to say, for the payment of Aushootosh's debts; and

3*rdly*.—That this suit is supplemental to the administration

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suit of 1872, and that having regard to its true nature, it could not have been brought previously to the suit of 1872.

1. The first of these points we disposed of during the argument. It is quite clear that the plaintiff personally claims no right to the possession of the estates in question. He only asks that they may be made chargeable in the hands of the defendant, with the payment of his own debt and the debts of the other creditors and may be administered with the rest of Aushootosh's estate.

2. The second point raises the more arguable question, whether the property in suit can be considered as vested in Mackintosh in trust for any specific purpose within the meaning of section 10. It is said that if the property in his hands is in fact chargeable with the payment of debts, it has then become vested in him for the specific purpose of paying those debts. But that view of the section is one which I cannot adopt. It appears to me, as I have already said in the case of *Kherodemoney Dossee* vs. *Doorgamoney Dossee* (3 C. L. R., 315) that the words "in trust for a specific purpose" are intended to apply to trusts created for some defined or particular purpose or object, as distinguished from trusts of a general nature, such as the law imposes upon executors and others, who hold recognized fiduciary positions.

The estates in question cannot be said to be subject to any *specific trust* in the hands of Mackintosh, any more than they were in the hands of Charroo Chunder and Surruth Chunder, the mortgagors; and the only trust to which they could be subject in their hands, is that general trust upon which a Hindu executor holds the whole of the estate which he represents. If a *general trust* of this kind is to be construed into a *trust for a specific purpose*, it appears to me that the word "specific" in section 10 would have no meaning whatever.

It is argued, that this view of the section is opposed to that which the High Court of Bombay have adopted in the case of *Lallabhai* vs. *Manknoobai*, I. L. R., 2 Bom., 415. But that case was decided under section 2 of Act XIV of 1859, which would appear to apply to all trustees, and which certainly contains no words restricting the scope of the section to *trusts for a specific purpose*.

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3. The third point also appears to me to be without foundation. It is true, that the prayer of the plaint consists of two main parts :—

1*st*.—That the property in suit may be declared by the Court to be subject to the payment of Aushootosh's debts; and, 2*ndly*, that in that case it may be dealt with under the decree in the administration suit, and that this suit may be considered as supplemental to the administration suit.

But I see no reason whatever why a suit to enforce the first part of this prayer should not have been brought, if at all, as soon as the amount of the plaintiffs' debt was ascertained in the year 1867, or at any rate, as soon as the plaintiff found, which he must have done soon afterwards, that Aushootosh's general estate was not sufficient to satisfy his debts. And I think he has no right to evade the law of limitation by putting off the administration suit till the year 1872 (nine years after Mackintosh's mortgage) and claiming the same period of limitation after that suit as he would have had from the time when his cause of action really arose, upon the specious ground that he is desirous his present suit should be supplemental to the administration suit.

There was no reason whatever why both this suit and the administration suit should not have been brought within six years, from the 11th of May 1867, and having regard to the circumstances under which the property in question is now sought to be charged in the hands of Mackintosh, I consider that the plaintiff has no excuse for delaying to enforce his charge against it at the first available opportunity.

It is clear, I think, that the defendants are quite right in their contention, that this is a case coming under the six years limitation prescribed by article 118 of the schedule; and that being so, the further point which the plaintiff wished to raise, namely, that he was not bound to bring his suit till the mortgages were foreclosed, would not avail him, because the mortgages were both foreclosed by the 10th of July 1870, and this suit was not commenced till the 23rd of November 1876.

Upon the ground of limitation, therefore, apart from the merits of the case, I consider that the appeal should be dismissed with costs.

[PRIVY COUNCIL.]

1879 *February 1st.*

RAM SAHAI AND ANOTHER, BY THEIR MOTHER AND GUARDIAN SURAJ BUNSI KOER . . . (PLAINTIFF) APPELLANT;

AND

SHEO PROSAD SINGH . . . (DEFENDANT) RESPONDENT.

Mitakshara Joint Estate—Sale of deceased father's Share—Rights of Purchase—Notice.

A, a Hindu governed by the Mitakshara Law, having two sons born in 1862 and 1869, respectively, in consideration of a loan, mortgaged joint ancestral property, consisting of an eight-anna share of a certain mouzah to B, by a deed of mortgage, dated 21st January 1870. In 1872 B obtained a decree upon the mortgage for principal, interest, and costs, and in execution of this decree proceedings were instituted and the eight-anna share in the mouzah attached.

After several adjournments the sale of the attached property was fixed for the 23rd May 1873, but on the 19th of the same month A died.

The proceedings were thereupon revived against A's heirs, his infant sons, and the sale was finally fixed for the 28th July 1873. Meanwhile on the 14th July, the mother and guardian of the infants filed a petition objecting to the sale and praying for the protection of the interests of her sons' as co-sharers with their late father in the property. The petition was dismissed, and an order passed thereon directing that the proper remedy was by regular suit.

The sale was accordingly held, and an eight-anna share of the judgment-debtor in the mouzah was sold and purchased by the respondents.

On the 27th of August following, this suit was instituted by the infants through their mother and guardian against B and the auction-purchasers to have the mortgage deed, the decree obtained by B, and the execution proceedings set aside, and to have the plaintiff's rights declared in the mouzah.

In that suit it was found that the property had been mortgaged to pay the personal and immoral debts of A, and that B had failed to make *bonâ fide* enquiry as to the necessity of the loan.

Held, that the respondents must be taken to have had notice, actual or constructive, of the plaintiff's petition of objections and of the order made thereon, and therefore to have purchased with knowledge of the plaintiff's claim and subject to the result of this suit; and according that as against the auction-purchasers as well as against B neither the appellants nor their interests in the joint ancestral estate were liable to satisfy their father's debt.

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Held, further, that the execution proceedings under which the mouzah had been attached and ordered to be sold had gone so far as to constitute in favour of the judgment-creditor a valid charge upon the land to the extent of A's undivided share and interest therein which could not be defeated by his death; and that the effect of the execution sale was to transfer to the purchasers the undivided share in the eight annas of the mouzah which had belonged to A; and that notwithstanding his death they were entitled to work out their rights by means of a partition.

Goor Pershad vs. *Sheodeen*, 4 All. R., 137, over-ruled.

APPEAL from a decision of a Division Bench (GLOVER and MITTER, *J.J.*) of the High Court at Fort William in Bengal, dated 21st July 1875.

The facts are fully set out in the following judgment of the Judicial Committee (1) of the Privy Council :—

The question to be determined on this appeal is—what are the respective rights of the infant plaintiffs and appellants on the one hand, and of the respondents claiming as purchasers at an execution sale on the other, in an eight-anna share of Mouzah Bissumbhurpore, a village situate in the district of Tirhoot? The material facts out of which this question arises are the following :—

Baboo Adit Sahai, the father of the plaintiff, became, on the death of his father Nursing Sahai in 1862, or by virtue of a subsequent partition effected with a co-parcener, the sole owner of certain ancestral immoveable property in Tirhoot, including eight annas of Mouzah Bissumbhurpore. It has been assumed throughout the proceedings that the case was governed by the law of the Mitakshara, that, or the Mithila law which is the same in respect of the questions raised in the suit, being the general law of the district. He had afterwards two sons, who are the infant plaintiffs. Of these, Ram Sahai was born in 1862, and Bhuggobutti in October 1869. These dates were disputed, but have, in their Lordship's opinion, been conclusively established in the suit.

On the 21st of January 1870, Adit Sahai executed, in favour of one Bolaki Chowdry, a defendent in the suit, though not a respondent in this appeal, an instrument in the form of a bond and

(1) Sir JAMES W. COLVILE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

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Bengali mortgage, whereby he bound himself to repay the sum of Rs. 13,000, which he had borrowed from Bolaki, with interest at the rate of fifteen per centum per annum, and pledged as security for such repayment the whole and entire proprietary shares owned and possessed by him in Mouzah Surakdeeha (also part of the ancestral estate), and Mouzah Bissumbhurpore.

This bond does not expressly state any reason for incurring the debt, but it refers to a negotiation for a loan of a smaller sum from another party, which had fallen through, and says that that sum was not then sufficient to meet the payments of the obligor's several creditors. It was registered on the 21st January 1870.

On the 30th December 1872, Bolaki Chowdry, suing on this instrument, obtained an *ex-parte* decree against Adit Sahai alone for the sum of Rs. 16,901-13-3, the amount due for principal, interest, and costs. The terms of this decree were in the usual terms of a decree in such a suit, viz., that the sum decreed should be realized by the sale of the mortgaged property, and that if the said property should not be found sufficient to meet the payment of it, the person and other properties of the judgment-debtor should be held liable for it.

On the 21st of March 1873, Adit Sahai presented a petition to the Court. Thus, after stating that execution having been issued in the usual way, the mortgaged property had been ordered to be put up for sale; that on production of Rs. 3,000 out of the decretal amount the Court had granted time for one month, and postponed the sale to the 7th of April; that the petitioner was very ill, and would be ruined by a forced sale, and prayed the Court to grant a further postponement of the sale, and, under the provisions of the 243rd section of Act VIII. of 1859, to appoint a surbarakar of the mouzahs in question, and certain other portions of the ancestral estate. From the order made on this petition it appears that the attachment of Bissumbhurpore had been for some reason already quashed, and that a new attachment was about to be made; and it was accordingly directed that in the meantime the petition should stand over; that a second attachment must have been made; for subsequent proceedings in execution were had, in the course of which Binda Koer, the mother of Adit Sahai, claimed to be entitled in her

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own right to one anna of Mouzah Bissumbhurpore, and to some part of the other property taken in execution. Her latter claim was allowed, but that affecting Bissumbhurpore was rejected; and the execution sale stood fixed for the 23rd of May 1873, when, on the 19th of that month, Adit Sahai died. The proceedings against Adit Sahai were thereupon revived in the usual way against his two sons as his heirs, and the 28th of July 1873 was fixed as the day of the sale of the property liable to the execution. On the 14th of that month, however, Mussumat Sooraj Bunsi Koer, as the mother and guardian of the infant appellants, filed a petition of objections for the protection of their interests as the sons of, and, therefore, under the Mitakshara law, the co-sharers with, their father in his lifetime in the property; and the order passed on that petition was in effect that the objections could not be heard and decided in the execution department; but that, if the petitioners had any interest in the property attached apart from and other than what their late father possessed, they could obtain their remedy by bringing a regular suit. The execution accordingly proceeded, the sale took place on the 28th of July, and the lot described as "the eight-anna share of the judgment-debtor in Mouzah Bissumbhurpore, part of the mortgaged property as *per* inventory of the decree-holder," was purchased by the respondents for Rs. 6,600. The sale proceeding was ordered to be duly kept with the record. Whether the usual certificate was afterwards issued to the purchasers, or in what terms, if issued, it was expressed, does not clearly appear on the record; but it is certain that they had not been put into possession on the 27th of August 1873, when the present suit was commenced. That is a suit by the infant appellants, suing by their mother and guardian, against the respondents as the purchaser of the eight annas of Bissumbhurpore at the execution sale, and also against Bolaki Chowdry, the execution-creditor. The plaint prayed for the adjudication of the right of the plaintiffs to, and the confirmation of, their possession in the eight annas of Bissumbhurpore; to have the mortgage bond of the 21st of January 1870, the *ex-parte* judgment obtained by the defendant Bolaki thereon, the miscellaneous orders rejecting the plaintiff's objections, and the auction sale of the 28th of July

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1873, set aside; and for an injunction to restrain the delivery of possession of the disputed property to the respondents. The claim to this relief was founded on the rights which, under the law of the Mitakshara, a son acquires on his birth in ancestral property, and the consequent limitation on the father's power to alienate, encumber, or waste that property; and the plaint contained the charges, usual in such cases, of immoral and extravagant conduct on the part of Adit Sahai.

The Subordinate Judge, by his judgment of the 27th of April 1874, found for the plaintiffs on all the issues in the suits, and gave them a decree for the confirmation of their possession, and the cancellation of the bond of the 21st of January, the decree founded thereon, and the execution sale.

He found in particular that there was no justifying necessity for the loan of the Rs. 13,000, or for the former loans in payment of which part of that money was employed; that the balance of the money was not shown to have been applied to family purposes; that Bolaki had failed in his duty to make *bond fide* inquiry into the necessity, but had lent without such inquiry the money to a man whom he well knew to be over head and ears in debt, and living a life of debauchery and sensuality; that consequently the *ex-parte* decree was void of all legal force against the family estate of which the debtor was but a joint owner; and that for the same reason, the execution sale effected thereunder could not stand so far as the family property was concerned. He also held that the rights of the purchasers stood on no better ground than those of the execution-creditor; that they were "not innocent purchasers in the proper sense of the term, since notice was given before the sale by the plaintiffs that the family property advertised for sale could not legally be sold for the debt of one of the joint members of the family." On appeal to a Division Bench of the High Court, the learned Judges, in their judgment of the 21st of July 1875, said:—"The Subordinate Judge has decided (in the words of the well-known case of *Hunooman Pershad*, 6 Moore's I. A., 421) that although the creditor would have been justified in advancing his money if he had made such inquiry as was open to him, and satisfied himself, as well as he could, as to the existence of the necessity, he did not

in this case make such inquiry, or rather, perhaps, his words may be taken to mean that the result of any inquiry must have shewn him quite clearly that the only necessity of Adit Sahai was his own improper and immoral way of life; which required the expenditure of funds not derivable from his regular income. And this decision would, we think, have been perfectly fair and right were we dealing with Bolaki Chowdry only; for he appears to have acted as the family mahajun for a long time previous, and must necessarily have been acquainted with Adit's circumstances and way of life."

The learned Judges, however, proceeded to rule that the purchasers (the respondents) stood on higher ground, that under the authority of the case of *Muddun Thakoor* vs. *Kantoo Lal*, L. R., 1 I. A., 321, they were to be treated as strangers who had purchased at public auction for valuable consideration, and had bought on the faith that the decree under which the sale was made was a proper decree, and properly obtained. In a subsequent part of their judgment they threw out that the onus of shewing against the purchasers that the decree was an improper one lay upon the plaintiffs; and that the evidence in the cause as to the habits and immoral conduct of Adit Sahai, though strong enough to support a decree against Bolaki Chowdry, might not be strong enough to support one against the purchasers. The formal decree passed was, that the decree of the lower Court should be reversed, and the suit as against the purchasers, defendants, dismissed.

The result, then, of the judgment and decree under appeal is, that the plaintiffs had established, as against the execution-creditor, a case which, had he been the purchaser at the execution sale, would have entitled them to full relief against him; but that they had not established a title to any relief against the purchasers, the respondents. The extreme contention on the part of the appellants is, that nothing passed, or could pass, to the respondents under the execution sale, because, on the death of the judgment-debtor before the sale, the whole of this interest vested by survivorship in his sons, leaving nothing upon which the execution could [illegible].

The extreme contention on the part of the respondents is, that the sale took effect on the whole of the mortgaged property,

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and passed the interest of the sons, as well as that of the father therein.

An intermediate proposition is, that the sale was operative upon the right, title, and interest of the judgment-debtor in the property put up for sale, so as to pass the share to which, upon a partition effected in his lifetime, he would have been entitled to eight annas of Mouzah Bissumbhurpore.

The arguments addressed to their Lordships make it desirable to consider, somewhat in detail, what are the principles of the Hindu law which are the foundation of the plaintiff's claim, and what the rights which flow from them. These questions are of course determinable by the texts of the Mitakshara, as interpreted by judicial decisions either of the Courts of India or of this board, and it cannot be said that the course of decision has been altogether uniform and consistent.

That under the law of the Mitakshara each son upon his birth takes a share equal to that of his father in ancestral immoveable estate is indisputable upon the questions whether he has the same rights in the self-acquired immoveable estate of his father, and what are the extent and nature of the father's power over ancestral moveable property, there has been greater diversity of opinion. But these questions do not arise upon this appeal. The material texts of the Mitakshara are to be found in the 27th and following slokas of the first section of the first chapter. It was argued at the Bar that, because in the third slokas of the above section it is said that the wealth of the father becomes the property of his sons, in right of their being his sons, and "that is an inheritance not liable to obstruction," their rights in the family estate must be taken to be only inchoate and imperfect during their father's life, and in particular that they cannot, without his consent, have a partition even of immoveable ancestral property. There was some authority in favour of this proposition, notwithstanding the texts to the contrary, which are to be found in the Mitakshara itself (see slokas 5, 7, 8, 11 of the 5th section of the first Chapter). But it seems to be now settled law in the Courts of the three Presidencies that a son can compel his father to make partition of ancestral immoveable property. On this point it is sufficient to cite the cases of

Laljeet Singh vs. *Rajcoomar Singh*, 12 B. L. R., 378, and *Raja Ram Tewary* vs. *Luchman Persad*, B. L. R., F. B. R., 731, decided by the High Court of Calcutta; that of *Kaliparshad* vs. *Ram Charan*, I. L. R., 1 All R., 159, decided by the High Court of the North-West Provinces; that of *Nagalinga Mudali* vs. *Subbiramaniya Mudali*, 1 Mad. H. C., 77, decided by the High Court of Madras; and the case of *Moro Vishvanath* vs. *Ganesh Vithal*, 10 Bom. H. C., 444, decided by the High Court of Bombay. The decisions do not seem to go beyond ancestral immoveable property.

Hence, the rights of the co-parceners in an undivided Hindu family, governed by the law of the Mitakshara, which consists of a father and his sons, do not differ from those of the co-parceners in a like family which consists of undivided brethren, except so far as they are affected by the peculiar obligation of paying their father's debt which the Hindu law imposes upon sons (a question to be hereafter considered), and the fact that the father is in all cases naturally, and in the case of infant sons, necessarily, the manager of the joint family estate.

The right of co-parceners to impeach an alienation made by one member of the family without their authority, express or implied, has of late years been frequently before the Courts of India, and it cannot be said that there has been complete uniformity of decision respecting it.

All are agreed that the alienation of any portion of the joint estate, without such express or implied authority, may be impeached by the co-parceners, and that such an authority will be implied, at least, in the case of minors, if it can be shown that the alienation was made by the managing member of the family for legitimate family purposes. It is not so clearly settled whether, in order to bind adult co-parceners, their express consent is not required, but this is a question which does not arise in the present case.

To what extent an unauthorized alienation can be impeached by co-parceners is a more important question, and one upon which there has been a greater conflict of authorities. Nor can it be said that the same law even yet prevails in all parts of India

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A distinction has been often made, both by Courts of Justice and by text writers, between alienations by private contract and conveyance, and alienations under legal process, as in the case of joint family property seized and sold in execution of a decree against one member of the family for his separate debt.

Since the decision, however, of the cases of *Virasavami Gramini* vs. *Ayyasvami*, 1 Mad. H. C., 471; of *Peddamuthalaty* vs. *N. Timma Reddy*, 2 Mad. H. C., 270; *Palanivelappa Kaundan* vs. *Manaru Naikan*, 2 Mad. H. C., 416; and *J. Rayarcharlu* vs. *J. V. Venkataramaniah*, 4 Mad. H. C., 60, it has been settled law in the Presidency of Madras that one coparcener may dispose of ancestral undivided estate, even by the private contract and conveyance, to the extent of his own share; and *á fortiori* that such share may be seized and sold in execution for his separate debt.

That the same law now obtains in the Presidency of Bombay, is shewn by the cases of *Damodhar Vithal Khare* vs. *Damodar Hari Soman*, 1 Bom. H. C., 182; *Pandurang Anandrav* vs. *Bhaskar Shaddshir*, 11 Bom. H. C., 72; and *Udaram Sitaram* vs. *Ranu Punduji*, 11 Bom. H. C., 76. But it appears from the case of *Vrandavandas Ramdas* vs. *Yamunabai*, 12 Bom. H. C., 229, and the cases there cited, that, in order to support the alienation by one co-parcener of his share in undivided property, the alienation must be for value. The Madras Courts, on the other hand, seem to have gone so far as to recognize an alienation by gift. There can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided Hindu family; and the law, as established in Madras and Bombay, has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition—Sec. 1, Strange's H. L., First Edition, p. 179, and App. Vol. II., 277 and 282.

In Bengal, however, the law which prevails in the other Presidencies, as regards alienation by private deed, has not yet been adopted. In a leading case on the subject, that of *Sadabart Prasad Sahu* vs. *Foolbash Koer*, 3 B. L. R., F. B. R., 31, the law was carefully reviewed, and the Court, refusing to follow the Madras

and Bombay decisions, held that, according to the Mitakshara law, as received in the Presidency of Fort William, one co-parcener had not authority without the consent of his co-sharers to mortgage his undivided share in a portion of the joint family estate, in order to raise money on his own account, and not for the benefit of the family. In another part of the same case the Chief Justice intimated a doubt upon a question which did not then call for decision, viz., whether, under a decree against one co-parcener in his lifetime, his share of joint property might be seized and sold in execution. That question must now be taken to have been set at rest by the recent decision of this tribunal in *Deendyal Lal* vs. *Jugdeep Narain Singh*, L. R., 4 I. A., 247, by which the law has so far been assimilated to that prevailing in Madras and Bombay, that it has been ruled that the purchaser of undivided property at an execution sale during the life of the debtor for his separate debt does acquire his share in such property with the power of ascertaining and realizing it by a partition.

But then the question arises, what is the consequence of the debtor dying before the execution is complete; whether in that event the co-parceners take his undivided share by survivorship, so as to defeat the remedy which the creditor would otherwise have against it?

This was much considered in the case already cited from the 11 Bom. H. C. Rep., 76. There, the debt was the separate debt of a son joint in estate with his father. The suit was brought after the death of the son, against the father. A decree was obtained against the father and the son's widow, and it was sought, in a supplemental suit, to enforce that decree against the son's undivided share in joint property, treating that share as liable, in the father's hands, for the son's debt. It was ruled that this could not be done; that, though a son might be liable to pay his father's separate debts, there was no corresponding obligation on a father to pay his son's debts; that the right of a son to a share in the joint ancestral property had died with him; and that his share, having survived to the father, was no longer a [illegible] upon which the execution could operate. This case is important, because the Court, whilst coming to the above

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decision, fully recognized the alienability of the share of one co-parcener, as established at Bombay, and showed, with some detail, how the remedy against such a share is to be worked out by the holder of a decree in the debtor's lifetime.

Mr. Mayne, in his valuable Treatise on Hindu Law and Usage, section 288, states that there had recently been a decision to the same effect as that just stated at Madras. Indeed, this was stronger than that at Bombay, because the debtor had died after decree, though before execution. The case is cited as that of *Kooppookonan* vs. *Chinnayen*, 1 Mad. Rep. 63, but their Lordships have been unable to obtain access to a copy of those reports, and can refer only to the abstract of the case in Mr. Mayne's work. The Chief Justice in that case seems to have taken a distinction between a specific charge on the land and a mere personal decree. The existence of such a distinction would be the logical consequence of the power of a co-parcener, as recognized at Madras and Bombay, to sell or mortgage joint property to the extent of his undivided share.

In his judgment in the Bombay case, see page 85 of 11 Bom. H. C. Reports, WESTROPP, *C.J.*, cited a decision of the High Court of the North-West Provinces—*Goor Pershad* vs. *Sheodeen*, 4 All. R., 137, which is still stronger than the last-mentioned case at Madras, because there the property had been actually attached in the debtor's lifetime.

It may be further observed that the Chief Justice, in the case already cited from 3 Bengal Reports (see page 36, *et seq.*,) seems to have intimated an opinion in favour of the general rule that an undivided share in joint property cannot be followed in the hands of co-parceners to whom it passed by right of survivorship. It was not, however, necessary to decide the point in that case.

Their Lordships have hitherto dealt with the powers and rights of ordinary co-parceners. They have now to consider how far those rights and powers are qualified by the obligation which the Hindu law lays upon a son of paying his father's debts. The obligation is thus succinctly stated by Chief Justice WESTROPP at page 83 of 11 Bom. H. C. R.:—

"Subject to certain limited exceptions (as, for instance, debts

contracted for immoral or illegal purposes), the whole of the family undivided estate would be, when in the hands of the sons or grandsons, liable to the debts of the father and grandfather."

And as authorities for this proposition he cites Colebrooke's Digest, Book I., Chap. V., fl. CLXVII., and *Girdhari Lall* vs. *Kantoo Lall*, L. R., 1 I. A., 321. One of the earlier authorities cited at the Bar upon this point was a case decided by the late Sudder Court of Lower Bengal in 1861, which was reported at page 213 of the decisions of the Sudder Dewanny Adawlut of Bengal for that year. In it an infant son sued by his guardian, in the lifetime of his father, to set aside various conveyances which had been made by the father of portions of the joint family estate, and to recover the property sold under them, and also to recover other portions of the estate which had been sold under orders of the Court in execution of decrees. The family was governed by the Mithila law, and the first point decided was, that the restrictions on a father's power of alienation over ancestral immoveable estate under that law were the same as those imposed by the law of the Mitakshara.

This case has recognized the distinction between alienations by conveyance and those made under process of execution. The Court set aside the sale by conveyance because no justifying necessity for them had been established, and it did this although the considerations for the sales were in some instances money raised in order to satisfy either judgment or bond debts. On the other hand, it dismissed the suit so far as it sought to recover property which had been sold under decrees of Court, on the ground that the son was under an obligation to pay the debts of the father if not contracted for immoral purposes, and that he had failed in this case to prove, as against the purchasers under the decrees, that they were so contracted. The words of the judgment on this point are: "Freedom on the part of the son, as far as regards ancestral property, from the obligation to discharge the father's debts, under Hindu law, can be successfully pleaded only by a consideration of the invalid nature of the debts ed. Now we are clearly of opinion that the plaintiffs has able to show that the expenses for which these decrees

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were passed were, looking to the decrees themselves, and we "cannot now look beyond them, immoral, and such as under Hindu Law the son would not be liable for."

The decision of this tribunal in the before-mentioned case of *Kantoo Lall* has, however, gone beyond this decision of the Sudder Dewany Adawlut; because it treats the obligation of a son to pay his father's debts, unless contracted for an immoral purpose, as affording, of itself, a sufficient answer to a suit brought by a son either to impeach sales by private contract for the purpose of raising money in order to satisfy pre-existing debts, or, to recover property sold in execution of decrees of Court. The judgment, moreover—and this is the portion of it that is chiefly material to the determination of the present appeal—affirms the principle laid down in the judgment of the Sudder Dewany Adawlut, that a purchaser, under an execution, is not bound to go further back than to see that there was a decree against the father; and that the property was properly liable to satisfy the decree, if the decree had been given properly against the father. In such a case, one who has *bonâ fide* purchased the estate under the execution, and *bonâ fide* paid a valuable consideration for it, is protected against the suit of the sons seeking to set aside all that has been done under the decree and execution, and to recover back the estate as joint ancestral property.

This case then, which is a decision of this tribunal, is undoubtedly an authority for these propositions:—

1*st*.—That where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and, 2*ndly*, that the purchasers, at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings.

Their Lordships have now to apply the principles to be

extracted from the authorities which have been considered to the case before them.

It has been found by both the Indian Courts, and, in their Lordship's opinion, properly found, that the plaintiffs, as between them and Bolaki Chowdry, the judgment-creditor of Adit Sahai, have established that neither they, nor the ancestral immoveable estate in their hands, were liable for the debt to Bolaki which had been contracted by their father. The two material issues on this point were: 1*st*, whether the bond to Bolaki, executed by the late father of the minors, was legally valid so far as the minors' interest is concerned, and whether the money thus borrowed was devoted to the satisfaction of debts incurred when the minors had no existence; and, 2*ndly*, what sort of a life did Adit Sahai live; did he spend the money borrowed from Bolaki Chowdry in immoral purposes? The Subordinate Judge, upon a full consideration of the evidence, found both these issues in favour of the plaintiffs, and decreed to them the relief sought by their plaint. The judgment of the High Court does not impeach this finding as regards Bolaki Chowdry. On the contrary, the words of the learned Judge who wrote the judgment of the Court are: "And this decision would, I think, have been perfectly fair and right were we dealing with Bolaki Chowdry only." There is no doubt a subsequent passage to the effect that the onus was clearly on the plaintiffs of showing against the respondents, who purchased at the auction, that the decree against Adit Sahai was an improper one, and that the evidence was insufficient to prove the fact.

If in this last passage of the judgment the Court meant to rule that the evidence which was sufficient to prove the two issues above mentioned, and the matters of fact involved in them against Bolaki Chowdry, was insufficient to prove them against the respondent, that ruling would, in their Lordship's opinion, be erroneous. The respondents were parties to the suit, they went to trial upon those issues, and had equally with Bolaki Chowdry the means of cross-examining the plaintiffs' witnesses, and of adducing counter-evidence. This observation, however, leaves untouched the principal ground upon which the High Court dismissed the plaintiff's suit as against the respondents, viz.,

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that upon the authority of the decision of this Board in *Muddun Thakoor* vs. *Kantoo Lal*, the respondents are to be treated on the footing of purchasers for value, without notice; for it is one thing to prove a fact, and another to prove that a particular party had notice of that fact. Their Lordships desire to say nothing that can be taken to affect the authority of *Muddun Thakoor's* case, or of the cases which may have since been decided in India in conformity with it. The material passage of the judgment in *Muddun Thakoor's* case is in these words :—

"A purchaser under an execution is surely not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or having given it, in putting up the property for sale under an execution upon it. It has already been shown that, if the decree was a proper one, the interest of the sons, as well as the interest of the father in the property, although it was ancestral, was liable for the payment of the father's debts. The purchaser under the execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against the father; that the property was properly liable to satisfy the decree, if the decree had been given properly against them; and he having inquired into that, *bonâ fide* purchased the estate under the execution, and *bonâ fide* paid a valuable consideration for it. The plaintiffs are not entitled to come in, and to set aside all that has been done under the decree and execution, and recover back the estate from the defendant."

It appears to their Lordships that the present case is clearly distinguished from that of *Muddun Thakoor*, and does not fall within the principle laid down in the passage just cited. It has been seen that before the respondents purchased, the claim of the plaintiffs was preferred in the Court wherein the execution proceedings were pending in the form of objections to the sale. The Court refused to adjudicate upon the claim in an execution proceeding, and accordingly allowed the sale to take place, but made an order referring the plaintiffs to a regular suit for the establishment of their rights. Their Lordships think that the respondents must be taken to have had notice, actual or constructive, of the plaintiffs' objections, and

of the order made upon them, and therefore to have purchased with knowledge of the plaintiffs' claim, and subject to the result of this suit. It follows that, as against them, as well as against Bolaki Chowdry, the plaintiffs have established that by reason of the nature of the debt neither they nor their interests in the joint ancestral estate are liable to satisfy their father's debt.

The question remains, whether they are entitled to any, and what, relief as regards the father's share in this suit? It seems to be clear upon the authorities that if the debt had been a mere bond debt, not binding upon the sons by virtue of their liability to pay their father's debts, and no sufficient proceedings had been taken to enforce it during the father's lifetime, his interest in the property would have survived on his death to his sons, so that it could not afterwards be reached by the creditor in their hands. On the other hand, if the law of the Presidency of Fort William were identical with that of Madras, the mortgage executed by Adit Sahai in his lifetime, as a security for the debt, might operate after his death as a valid charge upon Mouzah Bissumbhurpore to the extent of his one-third share. The difficulty is that, so far as the decisions have yet gone, the law, as understood in Bengal, does not recognize the validity of such an alienation.

Their Lordships are of opinion that it is not necessary in this case to determine that vexed question, which their former decisions have hitherto left open. They think that, at the time of Adit Sahai's death, the execution proceedings, under which the mouzah had been attached and ordered to be sold, had gone so far as to constitute, in favour of the judgment-creditor, a valid charge upon the land, to the extent of Adit Sahai's undivided share and interest therein, which could not be defeated by his death before the actual sale. They are aware that this opinion is opposed to that of the High Court of the North-West Provinces, 4 All. Rep., 137, already referred to. But it is to be observed that the Court by which that decision was passed does not seem to have recognized the seizable character of an undivided share in joint property which has since been established by the before-mentioned decision of this tribunal in the case of *Deendyal Lal*. If this be so, the effect of the execution sale

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was to transfer to the respondents the undivided share in eight annas of Mouzah Bissumbhurpore, which had formerly belonged to Adit Sahai in his lifetime; and their Lordships are of opinion that, notwithstanding his death, the respondents are entitled to work out the rights which they have thus acquired by means of a partition.

They will, therefore, humbly advise Her Majesty to allow this appeal, and to reverse the decree of the High Court, and also that of the Subordinate Judge, which is clearly wrong in so far as it absolutely sets aside the bond, the decree, and the execution sale, and in lieu therefore to make an order, declaring that by virtue of the execution sale to them the respondents acquired only the one undivided third share in the 8-anna share of Mouzah Bissumbhurpore, in the pleadings mentioned, which formerly belonged to Adit Sahai, with such power of ascertaining the extent of such third part or share by means of a partition as Adit Sahai possessed in his lifetime; and ordering that the appellants be confirmed in the possession of the said 8-anna share of Mouzah Bissumbhurpore, subject to such proceedings as the respondents may take in order to enforce their rights above declared. The order should further direct that the cost in the Courts below be apportioned according to the usual practice of those Courts, when the party plaintiff is only partially successful. But the appellants, having succeeded here on a material portion of their claim, are entitled to the costs of this appeal.

[FULL BENCH.]

EMPRESS 1879
March 26th.

AND

NOBIN CHUNDER DUTT . . . . . .

Recognisance, Forfeiture of—Criminal Procedure Code, Act X of 1872, section 502.

According to the fair construction of section 502 of the Code of Criminal Procedure, a Magistrate is not justified in forfeiting a recognisance to keep the peace under that section, unless the party charged with a breach of the peace has had an opportunity of cross-examining the witnesses upon whose evidence the rule to show cause has been issued.

THIS was a case referred to the High Court under section 296 of Act X of 1872 by the Sessions Judge of Dacca, regarding an order passed by the Deputy Magistrate of Moonsheegunge.

The order was made under the following circumstances:—In September 1877, Nobin Chunder Dutt and Krishna Coomar Dutt were required to enter into their recognizances in the sum of rupees 500 each to keep the peace for a year. Before this term had expired it was found in two cases, which came before the Magistrate, that a breach of the peace had been committed in a dispute between their respective servants and retainers. It was further found that, though neither Nobin Chunder Dutt nor Krishna Coomar Dutt had personally taken any part in the disturbance, both were interested in the subject of dispute; but it was also proved that the retainers of the latter had acted merely in self-defence.

The Magistrate thereupon issued a notice to Nobin Chunder to show cause why his recognizance should not be forfeited, but, subsequently, without examining the witnesses for the defence, declared the recognizance to be forfeited under section 502 of the Criminal Procedure Code.

The Sessions Judge, however, considered this order to be illegal on two grounds: firstly, because no breach of the conditions of the recognizance had been proved by any evidence admissible against Nobin Chunder Dutt; and, secondly, because, although a notice

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was issued on him to show cause, the Deputy Magistrate appears to have forfeited the recognizance without summoning the witnesses whom Nobin Chunder wished to call in his defence. Accordingly he referred the matter to the High Court.

The case came before Mr. Justice AINSLIE and Mr. Justice BROUGHTON, but their lordships were of opinion that the question involved was of very great importance and ought to be determined by a Full Bench, and accordingly they submitted the following reference :—

The evidence by which it is sought to charge Nobin Chunder Dutt with having done an act whereby he was liable to a forfeiture of the recognizance to keep the peace entered into by him was not taken in his presence, and he had therefore no opportunity of cross-examining any of the persons whose testimony constituted the proof on which the Magistrate relies. In the case of *Kalikant Roy Chowdhry*, 3 B. L. R., Ap. 155, the Court (E. JACKSON and D. MITTER, *J.J.*), held, under section 293 of the former Criminal Procedure Code, the words of which are substantially the same as those of section 502 of the Code of 1872, that before a Magistrate can declare that recognizances to keep the peace have been forfeited, there must be a regular judicial trial and legal inquiry before the punishment can be inflicted.

The circumstances of that case appear to be the same as those of the present.

Looking to the words of the law, we think it doubtful whether this view is strictly correct, though the course prescribed is one, the principle of which we approve of. The section says : Whenever it is proved before the Magistrate that any recognizance has been forfeited, he shall record the grounds of such proof and call upon the person bound by such recognizance to pay the penalty thereof, or show cause why it should not be paid ; and the following clause provides for the Magistrate proceeding by warrant to levy the amount, if sufficient cause be not shown, and the penalty be not paid; so that if the person called upon should not appear at all to show cause, the Magistrate may act on *proof* recorded before he ever had any chance of hearing of any proceedings against him being on foot.

The procedure prescribed in this section is an exception to the general rule, that a man charged with an offence can only be convicted on evidence taken in his presence. It may be that the person charged with an act involving forfeiture of recognizance is entitled to have any witness on whom the Magistrate relies, recalled for cross-examination, but it would appear that under the words of law, the Magistrate is not otherwise legally bound to examine such witnesses in the presence of the person charged as in ordinary trials.

We think this point of such importance, that it should be determined by a Full Bench, and we therefore refer the question whether a Magistrate is bound in law to record the proof on which he proposes to forfeit a recognizance to keep the peace in the presence of the person bound by such recognizance.

We agree with the Sessions Judge on the second point, that Nobin Chunder was entitled to have his witnesses examined when he appeared to show cause.

We defer making any final order until the reference to a Full Bench shall be disposed of.

The judgment of the Full Bench (1) was as follows:—

"We find that in the case referred to us Nobin Chunder Dutt was bound to keep the peace for the term of one year in his personal recognizance for the sum of Rs. 500. Within this term certain other persons were charged with a breach of the peace before the Deputy Magistrate, who thereupon convicted Krishna Tappadar and others of an assault; and though Nobin was not personally concerned in the offence, and was not made a defendant at the trial, the Magistrate decided upon the evidence that he (Nobin) had, by the agency of the convicted persons, caused that breach of the peace to be committed, and he thereupon called upon him to show cause why his recognizance should not be forfeited; and, on his appearance in Court, upon no further evidence than that which was recorded on the prosecution of Krishna Tappadar and others, he declared the recognizance forfeited.

"The course prescribed by section 502 of the Criminal Procedure Code, (and by section 293 of the former Code) takes the place of the cumbrous proceeding by *scire facias* which is in most cases necessary in England, before escheating recognizances to keep the peace.

"In this proceeding the defendant, who has entered into the recognizance, has an opportunity of pleading to the *scire facias*, and of thus raising the question whether he had been guilty of the assault or no; and upon the issue raised by that plea a trial takes place, at which evidence is gone into precisely as in a civil suit.

(1) MARTIN, *C.J.*, and JACKSON, PONTIFEX, BIRCH, and AINSLIE, *J.J.*

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"We think that, according to the fair construction of section 502, a Magistrate is not justified in forfeiting a recognizance under that section unless the party charged with a breach of the peace has had an opportunity of cross-examining the witnesses upon whose evidence the rule to show cause has been issued.

"That opportunity may arise either upon the prosecution of the accused person before the Magistrate for a breach of the peace, or any other offence, in which case, the accused, being the defendant, would of course have the right to cross-examine the witnesses for the prosecution; or it may arise upon a substantive application made to the Magistrate to forfeit the recognizance, in which case the witnesses, upon whose evidence the rule is granted, ought to be present and subject to be cross-examined by the accused, upon the occasion when cause is shewn against the rule.

"If no cause is shewn, or if the accused declines to cross-examine the witnesses, the Magistrate may of course proceed to dispose of the case upon the evidence as it stands. It is obviously sufficient for the purpose of justice that the accused has had the opportunity of cross-examination."

The Division Bench delivered the following final order in the case:—

We are of opinion that the order of the Magistrate directing the forfeiture of the recognizance entered into by Nobin Dutt must be set aside, and that the Magistrate should allow Nobin Dutt to have the witnesses, on whose evidence he relies to establish the forfeiture recalled for cross-examination, and should also allow him to call those witnesses whom he wishes to examine for the purpose of supporting the cause shewn.

[FULL BENCH.]

RAM CHUNDER CHUCKERBUTTY AND OTHERS (DEFENDANTS) . . . . . APPELLANTS;

AND

BROJONATH MOZUMDAR (PLAINTIFF) . . RESPONDENT.

1879 *April* 17*th*.

No. 253 of 1878.

Minor—Natural Guardian, Sale by—Act XL of 1858, *section* 18, *et seq.*

Where plaintiff claimed certain immoveable property as purchaser, under a kobala, executed by a Hindu widow as guardian of her minor son, *bond fide* for the benefit of such son, the widow not deriving powers from any appointment or certificate under Act XL of 1858, it was *held* that the plaintiff's title was good.

All the sections of Act XL of 1858, from the 18th onwards, respecting powers, duties and responsibilities, relate not to guardians generally, but to persons appointed, or to whom certificates have been granted under the provisions of the Act.

There being no indication in any part of the Act, of any intention to alter or affect the provisions of Hindu or Mahomedan law as to guardians who do not avail themselves of the Act, guardians acting without certificates will be regulated by the ordinary Hindu, or other law applicable to the case.

Abbasi Begum vs. *Rajrup Koower*, 2 C. L. R., 249, over-ruled.

APPEAL from a decision of the Subordinate Judge of East Burdwan, affirming the decision of the Moonsiff of that district.

The facts are these:—Satcowri Chatterjee, minor son of the late Bhuneti Dass Chatterjee, the original proprietor, after his succession to his paternal estate, died unmarried, leaving his mother Kusonomoyi Dabi, who afterwards died in Aughran 1278. At her death the four sons of the sisters of Satcowri, among whom was Obhoy Churn, a minor, became entitled to his estate. Kalidasi, the mother and guardian of Obhoy Churn, by a registered kobala, dated 11th Joisto 1282, sold, for the sum of Rs. 95, to the plaintiff a one-fourth share of the estate of Satcowri, as being the interest therein to which her son was entitled, alleging that this sale was forced upon her to meet certain expenses necessary for the benefit of the infant. Two of the sons sold their shares. The plaintiff now sued the son who had retained his share and

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the purchasers of the shares of the other sons for partition of the property and for possession of a one-fourth share on partition.

The defendants contended that Obhoy Churn was born after the death of Satcowri's mother, and that accordingly the plaintiff's vendor had no title; that the plaintiff's purchase was not *bonâ fide*, and that the plaintiff, therefore, could out recover possession by partition. At the hearing a further objection was raised, that as guardian of the minor Obhoy Churn, his mother Kalidasi had no power to sell his properties. The Moonsiff found that Obhoy Churn was born before the death of Prosonomoyi Dabi, and, that being so, was entitled to a four annas share in the property left by Satcowri; he also found that the sale was *bonâ fide*, and accordingly gave a decree for the plaintiff for possession of the four annas share in partition of the entire estate. The Subordinate Judge on appeal upheld this decision of the Court of First Instance. The defendants then preferred this second appeal to the High Court.

Baboo *Rash Behari Ghose*, and Baboo *Aushootosh Mookerjee*, for the Appellants.

Baboo *Gopal Lall Mitter*, for the Respondent.

The case having come on for hearing before Mr. Justice JACKSON and Mr. Justice TOTTENHAM, their lordships referred it to a Full Bench with the following remarks :—

JACKSON, *J.* JACKSON, *J.* :—

In this special appeal the point arises whether the plaintiff can claim title to the immoveable property in dispute under a kobala, executed by a Hindu widow as guardian of her minor son, such widow having been what is called a natural guardian not deriving powers from any appointment or certificate under Act XL of 1858.

This question was recently mooted before us on another special appeal; and there being at that time no authority cited on this precise point except the ruling of a single Judge, Mr. Justice BIRCH, in 24 W. R., 49, in the case of *Khetter Nath Dass* vs. *Ramgada Bhattacherjee*, we thought ourselves at liberty to act upon our own view of the law, and we certainly at that time considered that the restricting part of section 18 of Act XL of 1858 had no applica-

tion to an uncertificated guardian. On this point again arising today, our attention has been called to a decision in Regular Appeal No. 109 of 1876, *Abbassi Begum* vs. *Rajrup Kower*, (reported in 2 C. L. R., 249), which was heard by my brothers AINSLIE and MCDONELL on the 11th March last, and on that occasion, after full consideration, these learned Judges appear to have held that "it is unnecessary to go to the Mahomedan law to ascertain how far a stranger was justified in dealing with Umda Khanum in respect of her daughter's interests. Act XL of 1858 had been in force for nearly ten years when the transaction occurred, and the power of a guardian *de facto* to mortgage property of his ward must be determined with reference to this Act." I observed during the argument of this case that the whole effect of section 18 of the Act was really to confer upon a certificated guardian larger powers than other guardians would possess; because, whereas a guardian under the Hindu law in parting with a property of the minor would be restrained by considerations of legal necessity, or of that prudence which might be expected in the case of a prudent owner; and if the guardian should not appear to have been so guided, his acts would be, and have repeatedly been, set aside by the Courts. According to the first part of section 18: "Every person to whom a certificate shall have been granted under the provisions of this Act, may exercise the same powers in the management of the estate as might have been exercised by the proprietor, if not a minor, and may collect and pay all just claims, debts and liabilities due to or by the estate of the minor." Therefore, although a minor may sue his guardian in respect of any injurious bargain or transaction entered into by him, the transaction itself would stand and would be unimpeachable, provided it did not transgress the specific provision contained in the latter part of the section. Section 2 of Act XL of 1858, unlike the Bombay Act of 1864, relating to the same subject, merely directs that "the care of the person of all minors (not being European British subjects) and the charge of their property shall be subject to the jurisdiction of the Civil Courts." In the Bombay Act the wording is, that the charge of the property shall be vested in Civil Courts. Section 4 provides that "any relative or friend of a minor in respect of whose property such certificate has not been granted, or, if the property

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JACKSON, J.

consist in whole or in part of land, or any interests in land, the collector of the district may apply to the Civil Court to appoint a fit person to take charge of the property and person of such minor." Section 3,—after providing that "every person who shall claim a right to have charge of property in trust for a minor under a will, or deed, or by reason of nearness of kin, or otherwise, may apply to the Civil Court for a certificate of administration," and that "no person shall be entitled to institute or defend any suit connected with the estate of which he claims the charge, until he shall have obtained such certificate,"—says: "Provided that when the property is of small value, or for any other sufficient reason, any Court having jurisdiction may allow any relative of a minor to institute or defend a suit on his behalf, although a certificate of administration has not been granted to such relative." Section 9 provides:—"If no title to a certificate be established to the satisfaction of the Court by a person claiming under a will or deed, and if there be no nearer relative willing and fit to be entrusted with the charge of the property of the minor, and the Court shall think it to be necessary for the interest of the minor that provision should be made by the Court for the charge of his property and person, the Court may proceed to make such provision in the manner hereinafter provided." Clearly, therefore, the Court is not obliged to make such provision in cases where it thinks it unnecessary that any such provision should be made by it. One can conceive that cases might frequently arise in which, from the small extent or value of the property, or for other reasons, it should not be necessary that guardians should be formally appointed or certificates granted by the Court. In such cases, the guardians acting without certificates, would be regulated by the ordinary rules of the Hindu or other law applicable to the case. If the decision of the learned Judges in the case of Abbassi Begum be correct, then no doubt no person whatever can do any act in the way of management, or administration of a minor's estate without a certificate from the Court, and any person so inclined would do so at his own risk and peril. For these reasons, I am doubtful whether the decision referred to is correct, and I think that this case should be referred to a Full Bench for a decision on the point.

TOTTENHAM, *J.*:—

I am of the same opinion.

The following judgment of the Full Bench (1) was delivered by

JACKSON, *J.*:—

In order to a clear and correct understanding of what the Legislature intended in passing Act XL of 1858, it is necessary to refer to previous legislation on the subject.

By Regulation X of 1793, which contained a body of rules for the guidance of the Board of Revenue as a Court of Wards, provision was made for the appointment or confirmation, as the case might be (section 21), of guardians to landholders disqualified by minority or otherwise. The office of guardian was distinct from that of manager, but both offices might be united in the same person (section 6.)

Regulation V of 1799, dealing with the case of persons subject to the jurisdiction of the Zillah Courts who died leaving heirs under age, or incompetent, but not under the superintendence of the Courts of Ward, declared that the guardian or nearest of kin designated either by special appointment or by the law of the country as authorized to act for such heir, should not be required to apply to the Courts of Justice for permission to take charge of the estate, and (section 3) also prohibited (or restricted) the Courts from interference in each case except upon regular complaint (*i.e.*, suit, *vide* Regulation IV of 1793, sections 1 and 2.)

Next in order: Regulation I of 1800, reciting the two enactments already mentioned, and the omission in the first of them to provide for the nomination of a guardian where no person had been appointed by the parents, and also the necessity of preventing the next of kin in certain cases from exercising the authority given by the other of the two enactments, gave (section 1) power to the Judge, on receipt of a report from the Collector or other person interested, to appoint some other person in lieu of such next of kin, *reporting, however, in every instance* to the Court of

(1) GARTH, *C.J.*, JACKSON, PONTIFEX, BIRCH, and MITTER, *J.J.*

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Sudder Adawlut, which Court was also empowered to decide finally on the representation of any person aggrieved by an act of a Zillah Judge in the exercise of this authority.

This accordingly was the state of the law (Regulation XVII of 1805 not being material to our purpose) in 1855, when the measure was introduced into the 'Legislative Council,' which, after various modifications, became the Act XL of 1858.

The first section of this Act repealed (together with the entire Regulation I of 1800) so much of Regulation V of 1799, sections 2 and 3, as restricted the interference of the Civil Courts in cases of inheritance of minors, *i.e.*, prohibited them from dealing with the subject otherwise than on a regular complaint or suit.

This being done, it was open to the Legislature to make such further provisions as it thought necessary.

The course it took was to affirm the proposition of which the repealed enactments had contained a negation, and the declaration which immediately preceded the repealed provision, namely, that "a guardian, or nearest of kin, who by special appointment, or by the law and usage of the country, may be authorized to act, is not required to apply to the Courts of Justice for permission to take possession of the estate of the deceased," is not repealed.

This limited repeal is extremely significant.

The jurisdiction of the Civil Court is the general proposition affirmed; and the provisions which follow, define the extent to which, and the manner in which, that intention is to be carried out.

Accordingly, by section 3, every person who shall claim a right to have charge of property in trust for a minor under a will or deed, or by reason of nearness of kin, or otherwise, *may* apply for a certificate, and if he has occasion to institute or defend any suit connected with the estate, he *must* ordinarily obtain one, for he will not be entitled to appear until he shall have obtained a certificate. But if the property be small, or for any other sufficient reason, any Court having jurisdiction, may allow a relative to institute or defend without a certificate. It is material to observe that discretion here is given not to "the Civil Court" as

defined in section 29, but to the Court in which the suit is properly brought, or to be brought.

The succeeding sections 4 to 9 prescribe the course to be taken by the Court on the application which may, under certain circumstances, be made to it.

It is to be observed that the application may be made (section 4) either by a person claiming the right to have charge of the property, or by any relative or friend, who considers that an application should be made, or where the minor is a landowner, by the Collector.

Thereupon, after summary enquiry (section 6), if there be a person entitled under a will or deed, and willing, the Court (section 7) *shall* grant a certificate to such person.

Otherwise, and if there be any near relative, willing and fit, the Court *may* grant a certificate to such relative, and *may* also appoint a guardian after calling for a report, if it think fit (section 8); and if there be no one entitled, and no near relative willing and fit, *the Court shall think it to be necessary* for the interest of the minor that provision should be made by the Court for the charge of his property and person, the Court may proceed to make such provision in the manner provided in the Act.

Thus by the Act itself, according to the ordinary construction of language, although the restriction previously imposed on the jurisdiction of the Civil Court is legislatively taken away, and the subject matter is expressly declared to be subject to that jurisdiction, yet resort to the Court is not made obligatory, except in cases where a necessity arises for commencing or defending a suit; and even then for any sufficient reason, the Court having jurisdiction may dispense with the certificate, and further, when the question of appointing some one to the charge of a minor's property has been directly brought before the Civil Court, if there be no person entitled, and no near relation qualified and willing to act, it is entirely in the discretion of the Court to proceed or not, under the succeeding sections 10 to 12.

All the sections of the Act from the 18th onwards, respecting powers, duties, and responsibilities, relate not to guardians generally, but to persons appointed, or to whom certificates have been granted, under the provisions of the Act.

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It is clear, however, that as some persons could take charge of the estates of minors, and maintain or defend suits connected therewith, without having received certificates, the rules in question apply only to certificated managers, and to guardians appointed under the Act.

An example of this occurs unmistakeably in the words of sections 25 and 27. By the former section every guardian appointed by the Civil Court, or by the Collector under the Act, is bound to provide for the suitable education of a male minor; but section 27 forbids the appointment of a guardian to any minor, whose father is living, and not a minor. Consequently, this Act does not oblige the father, as guardian of a male minor, to educate his son.

Section 18 applies in terms to a manager acting under a certificate, and to such manager only; it confers on him generally the powers of the owner, but in regard to acts of alienation beyond certain limits, it requires that his acts, in order to be valid, should have the previous sanction of the Court, a provision obviously expedient and proper in the case of a manager deriving his powers from the Court, and also accountable to the Court, but not suitable in the case of a manager altogether unconnected with the Court. In truth, it seems impossible to support the view that no manager can exceed the limits prescribed by that section, except upon the supposition that no manager can deal with a minor's property at all, unless a certificate has been granted to him. But section 3 shows that for *any sufficient reason*, not merely by reason of the small value of the property, a Court may allow a relative to defend a suit for a minor without certificate; and in that way he might, by compromise, and with the sanction of the Court in which the suit happened to be pending, give up a most valuable estate. But it is inconceivable that if the Legislature had meant only the provisions of this Act to curtail the powers of all guardians (of minors other than European British subjects) it should have done so by express words, instead of referring only to managers and guardians appointed under the Act, or "to whom a certificate has been granted," and then leaving a loophole for escape from the necessity of obtaining a certificate at all.

In fact there is no indication, whatever part of the Act be examined, of any intention to alter or affect the provisions of Hindu or Mahomedan law, as to guardians who do not avail themselves of the Act. The scope of the enactment is merely to remove legislative prohibitions, to confer expressly a certain jurisdiction, and to define exactly the position of those who avail themselves of, or are brought under the Act, leaving persons to whom any existing rules of law apply unaffected.

It is obvious, that to bring all minor's estates without exception under the operation of the Act would be most oppressive in many cases, for not only would many guardians be unwilling to act under a certificate, with the resulting obligation, but in many instances the estate would be nearly, or quite, absorbed in the costs.

The only indication of an intention to compel persons generally to come under the Act in the management of minor's property, is the prohibition hitherto, (unless with the leave of a Court), from instituting or defending suits on behalf of the minor, unless they shall have obtained a certificate of administration.

But that provision seems to act directly in favor of the interpretation which appears to us to be the correct one, for it recognizes the fact that a person may be in charge of a minor's property under a claim of right to have the charge, which it does not forbid, and only makes it obligatory on him, if he desires to come before the Court as a litigant in respect of such property, to obtain a certificate, unless the Court should think fit to dispense with it.

Why the Legislature should have had recourse to such a circumlocution, if it meant simply to say that no one could be lawfully in charge of a minor's property except the Court of Wards, or a person holding a certificate from the Civil Court, it is difficult to understand.

It has been suggested that sections 3 to 4 do indeed allow the exercise of a discretion, but that such discretion is to be exercised by the Court and not by the volunteer guardian; and the inference intended would seem to be that every person claiming a right to the charge of a minor's estate is bound to come to the Civil Court and ask for a decision, whether the Court will grant

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a certificate or dispense with one; and it is also a view put before us, that the whole law as to minors is now comprehended in the Acts regulating the Court of Wards and the present Act, and no third kind of guardian is permissible.

But if so, what becomes of those cases in which the Court, under section 9, does *not* think it "necessary for the interest of the minor that provision should be made for the charge of his property and person?

And is the guardian of a minor with a small estate to put his ward to the expense of making an application to the Court, of which the result may very probably be that the Court will think it unnecessary to make any order?

It must be observed, moreover, that the Act contains no provision, enabling the Court to act of its own motion.

That the rights and powers of guardians (by deputation from the Sovereign in theory) were recognized by the Hindu law is certain. That the British Government in early days was reluctant to meddle with those rights, is clear; and it is equally improbable, inconsistent with its previous policy, and unwarranted by its own language to suppose that the Legislature meant in 1858 to sweep away all ancient law on the subject, and to subject to one inflexible rule the property of all minors throughout Bengal.

We, therefore, answer the question put to us in the affirmative; and this being the only question in the case, the Special Appeal is dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

FAKIR MAHOMED KHAN ... (DEFENDANT) APPELLANT;
AND
FAZELUDDEEN KHAN ... (PLAINTIFF) RESPONDENT.

1879 *March* 18*th*.

No. 942 of 1878.

Registration—Priority—Bill of Sale—Act VIII of 1871, *sections* 48 *and* 50—*Act III of* 1877, *sections* 48 *and* 50.

Plaintiff, having purchased the jote right of the defendant's landlord by a deed of sale, dated Cheit 1282, and, although the property was below the value of Rs. 100, registered, sued the defendant for possession and for the recovery of the rent of the jote.

The defendant, who was actually in possession, alleged that he himself had purchased, also for less than Rs. 100, the same jote right from his landlord by a deed of sale, dated Pous 1282 (or two months prior to the date of the other) but unregistered. It having been found that the defendant, previous to his alleged purchase, had held the jote lands as tenant of their common vendor under a kabuliat, and that this kabuliat had been allowed to remain in the hands of the landlord, it was *held*, that under the circumstances, the plaintiff's deed being registered, though registration was optional, was entitled to priority.

Section 50 of Act VIII of 1871 (corresponding with section 50 of Act III of 1877) is intended to apply to the case of two innocent purchasers giving the preference to him who has taken the greater precaution to secure his title, but not to the case of a subsequent purchaser who registers, but who at the date of his purchase had actual notice of a prior unregistered deed of sale.

Notice of a prior unregistered alienation must be very clearly proved against a subsequent registered purchaser in order to prevent his registered conveyance taking effect.

Section 48 of Act VIII of 1871 (corresponding with section 50 of Act III of 1877) is applicable to all oral transactions, whether voluntary or for valuable consideration, and whether the property is moveable or immoveable, and whether its value is over or under Rs. 100.

Per PONTIFEX, *J.*—The insertion of the words relating to possession in section 48 appears to have been merely intended as a declaration of the law, limiting the operation of oral alienations. It was in effect equivalent to saying that, although the Registration Acts are not intended to interfere with oral alienations which, from the nature of the case, cannot be registered, yet the only oral alienations of which the law can take notice in competition with registered instruments are those which are properly established by evidence of possession.

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Statement.

APPEAL under section 15 of the Letters Patent, from a decision of Mr. Justice TOTTENHAM, reversing a decision of the Officiating Judge of Rungpore.

The plaintiff in this case, having purchased the jote title in respect of part of his vendor's tenure, under a registered deed of sale, dated Cheit 1282, brought this suit to recover rent from the tenant in occupation.

The principal defence was, that the defendant was no longer tenant under the jotedar, but was in respect of his holding himself jotedar holding directly under the zemindar. The defendant alleged that he had purchased the jote right to his own holding from the plaintiff's vendor by a deed of sale, dated Pous 1282, two months prior to date of the plaintiff's deed of sale, but unregistered. The purchase-money in this as well as in the case of the plaintiff's purchase was under Rs. 100. The Moonsiff declined to try the question of title, and dismissed the suit on the ground that the plaintiff had never received rent, and that therefore the relation of landlord and tenant did not exist between them.

On appeal the District Judge tried the question of title, deciding in favour of the plaintiff, having taken for granted that a registered deed must prevail over an unregistered deed even where registration is optional.

On the case coming up on second appeal to the High Court, Mr. Justice TOTTENHAM, who heard the appeal, considered that, although the registered deed must prevail if section 50 of the Registration Act, VIII of 1871, were to be construed strictly, the Legislature did not intend that if the section should be so construed; that the only reasonable construction in a case of this kind was that the registered deed should take effect in preference to the unregistered deed only when the person who executed the registered deed had power, or was in a position to execute it and carry out its provisions. Adopting this construction, the learned Judge was of opinion that the first sale by the unregistered deed had passed the entire title of the vendor, who accordingly could have no property in the jote to convey two months later to the defendant. Accordingly, the suit was dismissed.

The plaintiff appealed under the Letters Patent.

Baboo *Ishur Chunder Chuckerbutty*, for the Appellant.

Moonshee *Serajal Islam*, for the Respondent.

The following judgments were delivered by the Court (1) :—

GARTH, *C.J.* :—

In this case we are unable to agree with the learned Judge of this Court.

The suit was brought by the plaintiff to recover the rent of a jote from the ryot defendant, upon the ground that he had purchased the estate of the defendant's landlord.

The plaintiff's purchase, as to which there was no dispute, was effected by a deed of sale, dated in Cheit 1282, which was duly registered.

It is found as a fact by the lower Court, that for some time previous to the execution of this deed, the defendant had been the tenant of the property under a kabuliat, which he had given to the father of the plaintiff's vendor, and had since paid rent to the latter in accordance with the kabuliat.

The defendant's case was, that by another deed of sale, dated in Pous 1282 (two months prior to the plaintiff's deed) the landlord had conveyed the same estate to him, the defendant; but this bill of sale was not registered.

Upon these facts the District Judge held that the plaintiff's registered deed must prevail against the defendant's deed, which was not registered; and he made a decree in the plaintiff's favor for the rent claimed.

The learned Judge of this Court considered that the District Judge was wrong. He says that section 50 of Act VIII of 1871 ought not to be construed literally, and that if the defendant's bill of sale in this case was really executed before the plaintiff's bill of sale, the vendor's right to make a conveyance of the same property to the plaintiff, or to any one else, was at an end; and that in that case nothing passed to the plaintiff by his deed, whether it was registered or not.

The learned Judge, therefore, remanded the case to the District Judge to determine the question, whether the defendant's deed

(1) GARTH, *C.J.*, and PONTIFEX, *J.*

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was genuine, with an intimation, that if it was so, the defer ought to succeed.

I cannot agree with the learned Judge in the constru which he has thus put upon section 50 of Act VIII of 1871; it appears to me that, if that were the right construction, section would be virtually inoperative.

It is perfectly true that section 18 of the Act leaves it opt with purchasers, where the value of the property purchas under Rs. 100, to register their deeds or not; but if they not to register, I think that the Act intends that they sh subject to the risk, (under section 50) of having their title placed by a subsequent innocent purchaser without notice, v conveyance is duly registered.

It seems to me that the only reasonable construction of se 50 is, that where property under the value of Rs. 100 is purcl by two innocent purchasers, the one by a registered, and the by an unregistered deed, and there is no fraud shewn or circumstances, which in equity would protect the unregis purchaser against the registered, the title of the latter prevail.

This appears to have been decided by several cases in Court to which our attention has been directed.

The first was a case of *Gooroo Doss* vs. *Kushoom Koon Dossee* (9 W. R., 547), decided under section 68 of Act of 1864, which contains a provision similar to section 50 of VIII of 1871.

In that case it was held, that the defendant's regist deed, though subsequent in date to the unregistered deed of plaintiff, must have the priority.

This ruling was followed in the case of *Gobind Chunder* vs. *Poorno Chunder Sein* (10 W. R., 36), which is a decisio the same effect under the same Act; and by the case of *Soodh Bhuttacharjee* vs. *Odhoy Chunder Bundopadhya*, (10 B. L. R., 3 decided under section 50 of Act XX of 1866, which is sin in terms to section 50 of the Act of 1871; and the reaso of the Judges in the case of *Sheik Ryasutulla* vs. *Doorga C der Pal* (15 B. L. R., 294), is also to the same effect.

The same point has been decided in the same way under

Act of 1871, by the High Court of Bombay, in a case reported in 12 Bom. H. C. R., 179.

Against this current of authorities the only case in point, to which we have been referred, is a decision of GLOVER, *J.*, in 20 W. R., 287, which though, no doubt, directly contrary to the rulings above referred to, appears to have proceeded upon a misapprehension of the true meaning of the judgment in the case of *Nurshing Poorkait* vs. *Bikrum Manjee* (14 W. R., 250.)

This latter case, which was decided by JACKSON and MITTER, *J.J.*, proceeded, not upon section 50, but upon section 48 of the Act of 1866. That section is similar in terms to section 48 of the Act of 1871, and it does not apply to the case of two deeds conveying the same property, one registered and the other not, but to the case of an oral agreement for purchase, coupled with possession of the property on the one hand, and a subsequent registered deed relating to the same property on the other.

An oral agreement for the sale or letting of land, coupled with possession, is protected by section 48 as against a subsequent registered deed; and there is good reason in this, because an oral agreement is, of course, not capable of registration; whereas the purchaser under a written conveyance can always register it, if he pleases, and so give the public notice that he has become the purchaser. The law does not oblige him to register; but if he omits to do so, he runs the risk of having his title displaced by a subsequent registered purchaser without notice.

Another case in the 12 W. R., 217, decided by JACKSON and MARKBY, *J.J.*, arose also under section 48 of Act XX of 1866, and is, therefore, inapplicable to the present case.

It certainly seems to have been the opinion of Mr. Justice MARKBY, in more than one of the authorities to which we have referred, that a purchaser under an unregistered deed, who has obtained possession, would have priority as against a subsequent purchaser under a registered deed; and this point appears to have been directly decided by the same learned Judge and Mr. Justice PRINSEP, in an unreported case, Special Appeal No. 1122 of 1876, but I doubt whether this doctrine (stated broadly) is in accordance with the provisions of section 50 of the Registration Act.

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That section certainly contains no qualification of the kind, and I consider that the Court is not at liberty to import one.

If, indeed, it could be shown, that the subsequent purchaser under the registered instrument had notice of the conveyance by the prior unregistered deed, then the equitable doctrine, which obtains in like cases in England, and which is explained in the case of *Le Neve* vs. *Le Neve*, 3 Atk., 646, and 2 White and Tudor's L. Cases, 34, might prevent the registered purchaser from asserting his rights against the unregistered under section 50.

But in this case no question of equity, nor of the defendant having been put into possession under his alleged deed, arises.

No suggestion of the kind was made by the defendant in either of the lower Courts, and the possession which he held after the deed was executed was perfectly consistent with his previous position as tenant to the plaintiff's vendor under his own kabuliat.

That kabuliat was produced at the trial by the plaintiff's vendor himself; and this fact is directly opposed to the defendant's contention, because if he had purchased the property honestly by a bill of sale, the kabuliat which he had previously given ought in regular course to have been returned to him.

We must take it, therefore, that the case with which we have to deal now, is one between two innocent purchasers, one of whom has, and the other has not, registered his deed of conveyance; and I think, that the only reasonable way in which we can give any effect to the provisions of section 50, is by allowing the plaintiff's registered deed a priority over that of the defendant.

As my learned brother is also of this opinion, the judgment of this Court will be reversed; the judgments of the lower Courts will be restored; and the plaintiff's suit will be decreed with costs in all the Courts.

PONTIFEX, *J.* PONTIFEX, *J.*:—

This Letters Patent appeal raises an important question upon section 50 of the late Registration Act, upon which there has been a conflict of decisions; and as that section has been re-enacted in

the same terms by section 50 of the present Registration Act, III of 1877, it is advisable to consider its scope and operation carefully.

In the present appeal, the defendant (respondent) was originally the tenant of a certain jotedar, but he alleges that he purchased the jote right from the jotedar by a deed of sale, dated Pous 1282, for less than Rs. 100, which deed, registration being optional, was not registered.

The plaintiff (appellant) satisfactorily proved a deed of sale to himself from the jotedar, dated Cheit 1282 or two months subsequent to the defendant's alleged purchase. The plaintiff's deed was registered, although below the value of Rs. 100.

The plaintiff sued for possession, basing his title on the words of section 50 of the Registration Act of 1871, which in effect enacts, that any document which "may be registered," although it is not compulsory to register it under the Act, "shall, if duly registered, take effect as regards the property comprised therein, against every unregistered document relating to the same property;" and under that section it was contended broadly on behalf of the plaintiff that under no circumstances whatever can a prior deed, unregistered, prevail against a subsequent deed duly registered, although registration may be merely optional—the property being of less value than Rs. 100.

The District Judge decided the case in favour of the plaintiff on this broad ground; but on appeal to this Court, Mr. Justice TOTTENHAM held, that section 50 was not in all cases to be construed strictly, and that it could not apply to the present case, because if the defendant could prove his conveyance, the common vendor would have nothing left in him to convey to the plaintiff under the subsequent deed, which, therefore, although registered, could not operate upon the property. But inasmuch as the defendant's alleged conveyance had not been proved in the lower Court, Mr. Justice TOTTENHAM remanded the case to the first Court, to try the issue whether the defendant's kobalah was a genuine instrument, in which case the suit was to be dismissed.

Against that decision, the plaintiff now appeals, and in the argument of his appeal, several decisions have been cited to support his contention that under all circumstances a registered deed must

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prevail over a prior deed which has not been registered. The decisions so cited are the following :—

Gooroo Doss vs. *Kushoom Koomaree Dossee*, 9 W. R., 547; *Gobind Chunder Roy* vs. *Poorno Chunder Sein*, 10 W. R., 36; *Mofuzil Hossein* vs. *Golam Ambiak*, 10 W. R., 196; *Soodharan Bhuttacharjee* vs. *Odhoy Chunder Bundopadhya*, 10 B. L. R., 380; *Shaik Ryasutulla* vs. *Doorga Churn Pal*, 15 B. L. R., 294; *Jusab Haji Jafar* vs. *Haji Gul Muhammad*, 12 Bom. H. C. R., 875.

On the other hand, several cases have been cited on behalf of the respondent as authorities to show that, with respect to properties of less value than Rs. 100, a prior deed, coupled with or followed by possession, will, although unregistered, prevail against a subsequent deed duly registered. The following cases were cited in support of this contention :—*Salim Shaikh* vs. *Boidonath Ghuttack*, 12 W. R., 217; *Gouree Kant Roy* vs. *Gridhur Roy*, 12 W. R., 456; *Nursingh Poorkait* vs. *Bikrum Manjee*, 14 W. R., 250; *Narain Doss* vs. *Gunga Ram Dharah*, 20 W. R., 287; *Kirty Chunder Haldar* vs. *Raj Chunder Haldar*, 22 W. R., 273.

And in addition, we were furnished with the judgments of MARKBY and PRINSEP, *J.J.*, in an unreported case [Special Appeal No. 1122 of 1876] which do in fact lay down that, where the property is under the value of Rs. 100, a prior deed with possession, although unregistered, prevails against a subsequent deed duly registered. Mr. Justice MARKBY appears to have founded his judgment on the case of *Salim Shaikh* vs. *Boidonath Ghuttuck*, 12 W. R., 217 [S. C. 3 B. L. R., 312], and the cases there referred to. But the case in 12 W. R. was a case in which there was a conflict between a verbal or oral grant, which, from the nature of the case, could not be registered, and a subsequently registered document; and it was decided under section 48 of Act XX of 1866, which was in the same terms as section 48 of the Act of 1871, but with this difference, that in the latter Act the following words are added "unless where the agreement or declaration has been accompanied or followed by delivery of possession."

Mr. Justice PRINSEP, in his judgment, also relies on the case in 12 W. R., 217, and adds :—"Comparing section 48 with section 50, I am unable to learn any valid reason for any difference

between an unregistered and an oral agreement, both followed by delivery of possession, or why, when registration is optional, such a deed should be placed at a disadvantage? In other words, why, because such an agreement has been reduced to writing, it should not be at least as good as the previous state of the same transaction before the terms agreed on were fixed and made certain by a permanent record?"

I am unable to follow this reasoning to its full extent; for it seems to me to be founded on the assumption that the words relating to possession, which are found in section 48 of the Act of 1871 and the present Act, were inserted for the protection of oral alienations; whereas, in my opinion, they were inserted for the purpose of limiting the operation of oral alienations, and of declaring the law with respect to them. Section 48 of Act XX of 1866 had provided, that all instruments duly registered should take effect against any oral agreement or declaration. Yet that Act did not declare oral alienations to be invalid to all intents and purposes, nor was it the object of the Registration Acts to repeal the existing law, which authorised oral alienations of both moveable and immoveable property of any value, and whether voluntary or for valuable consideration. It, therefore, became necessary to qualify the too general language of section 48 of Act XX of 1866, and at the same time to declare the law as to oral alienations, which were not intended to be affected, which object was accomplished by patching on a proviso to the section. Section 48 of the Act of 1871 is applicable to *all* oral transactions, whether *voluntary* or for valuable consideration, and whether the property is moveable or immoveable, and whether its value is over or under Rs. 100. With respect to moveable property and alienations by way, gift of immoveable property, possession had always been requisite to complete the alienation, and as between a purchaser for value by deed, and a prior purchaser for value by oral alienation, even if possession was not theoretically essential (which may be doubtful), the fact of possession must always have been a very material consideration. The insertion of the words relating to possession in section 48, appears to me, therefore, to have been merely intended as a declaration of the law limiting the operation of oral alienations. It was, in effect, equivalent to saying that

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although the Registration Acts are not intended to interfere with oral alienations, which from the nature of the case cannot be registered, yet the only oral alienations of which the law can take notice, in competition with registered instruments, are those which are properly established by evidence of possession.

The insertion in section 48 of the words relating to possession, in fact rather detracts from, than adds to, the security of oral alienations, because unless the oral alienee was in possession, the Courts would now be excluded from considering any equity which he might have against a subsequent alienee by registered deed. As alienations by deed for value of immoveable property below the value of Rs. 100, although unregistered, continued to be perfectly valid and effectual against the vendor or mortgagor, I think that, though it may have been intended to encourage registration of deeds, even where the property was below the value of Rs. 100, it was not intended to deprive a perfectly lawful and honest alienee of immoveable property of any equities he might be able to establish against a subsequent alienee by deed duly registered. In my opinion, therefore, words relating to possession, corresponding with those in section 48, were advisedly omitted from section 50; for the insertion of such words might have deprived an unregistered alienee for value, but without possession, of all such equities, even though the absence of possession might be satisfactorily accounted for. I cannot suppose that it could have been the intention of the Legislature, where registration was not made compulsory, to protect cases of fraud; or to effect by a side wind (section 50), what they had carefully refrained from effecting directly, namely, notwithstanding section 18, to make the registration of all alienations by deed *practically* compulsory. It seems to me that precisely the same considerations apply to the interpretation of section 50, as Courts of Equity have applied to the English Registration Acts for Middlesex and Yorkshire. By the English Acts, every conveyance is to "be deemed fraudulent and void against any subsequent purchaser or mortgagor for valuable consideration, unless" registered as required by the Acts. But an unregistered deed, as against the vendor or mortgagor, is perfectly valid and effectual in the same way as an unregistered deed for value of property below the valu

of Rs. 100, is in India valid against the vendor or mortgagor; or, in other words, registration is in both cases optional, although the alienee, if his deed is unregistered, is subject to a possible penalty, which, in England, only applies when there is a subsequent innocent purchaser by registered deed, in which case preference is given to him. The words used in the English Acts are at least as strong as the language used in sections 18 and 50. Yet under the English Acts Courts of Equity held, that if they allowed a purchaser for value, who had actual notice of a prior unregistered conveyance, to prevail against it, by registering his own subsequent deed, fraud, instead of being prevented, would be protected. For a subsequent purchaser would, by registration, be enabled to defraud a prior purchaser of that title which the subsequent purchaser, at the time of his own purchase, knew was lawfully in the prior purchaser. (*Jellund* vs. *Stanbridge*, 3 Vesey, 485). Lord ELDON in *Davis* vs. *Earl of Strathmore*, 16 Vesey, 428, has pointed out the distinction between an Act of Parliament denying legal effect to certain instruments, and declaring them void to all intents and purposes, a Court of Equity collecting from the more extensive words the inference that the equitable as well as the legal jurisdiction was intended to be prohibited. This distinction, I think, exists in the construction which ought to be placed on the Registration Acts, with respect to instruments affecting property of less value than Rs. 100, and instruments purporting to affect property of the value of Rs. 100 and upwards. In the latter case, the instrument, if unregistered, is void to all intents and purposes, and the equitable jurisdiction of the Courts is ousted. In the former case, the instrument, although unregistered, is not void to all intents and purposes, and the equitable jurisdiction of the Courts, in my opinion, remains unaffected. In *Benham* vs. *Keane* (1 Johnson and Heming, 702) Wood, V. C., very clearly stated the principles of equity which apply. He says: "The whole doctrine of notice proceeds on this,—where a man has created a charge affecting his estate, he is not at liberty to enter into any new contract in derogation of the interest which he has created. This Court will not allow him to do the wrong himself, nor will it suffer any third person to help him to do it. No one will be permitted to enter

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knowingly into a contract with a person so situated, which would redound to his benefit at the expense of the prior incumbrancer."

The conscience of a purchaser is affected through the conscience of the person through whom he buys, if that person is precluded by his previous acts from honestly entering into a contract to sell, and therefore any one who purchases *with the knowledge that his vendor is precluded from selling*, "is subject to the same prohibition as the vendor himself." In the present case, moreover, consideration cannot be withheld from the fact, that when the Act of 1871 was passed, the case reported in 3 B. L. R., 312, must have been within the knowledge of the Legislature, and was the probable cause of the amendment of section 48. That case dealt with section 48 of the Act of 1866, which was then almost identical in its terms with section 50 of the Act of 1871, for it did not include the words relating to possession. Yet it was held in that case, that the language of the section, as it then existed, did not render oral alienations wholly inoperative, when competing with subsequent deeds duly registered. Notwithstanding that decision, however, section 50 was allowed to remain without alteration or addition, and we may therefore suppose intentionally liable to the same construction as was adopted in that decision. I think, therefore, that we ought to interpret section 50 as intended to apply to the case of two innocent purchasers, giving the preference to the one who has taken the greater precaution to secure his title, but not as intended to apply to the case of a subsequent purchaser, who registers, but who at the date of his purchase had *actual notice* of a prior unregistered purchase. For otherwise, in this latter case, the subsequent purchaser with *full notice*, would, by registration, be enabled wilfully to defraud a prior purchaser of the property which he had honestly purchased and which had been properly and *legally* conveyed to him. But according to the English decisions the notice or fraud must be very clearly proved. As said in *Wyatt* vs. *Barwell*, 19 Vesey, 409:—"We cannot permit fraud to prevail, and it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another, that we will suffer the registered deed to

affected." So here, to affect a subsequent registered docu-
nt, we ought to hold that, notice of the prior unregistered
enation must be very clearly proved against the subsequent
gistered purchaser, in order to prevent his registered conveyance
king effect.

Now, in the present case, the defendant (respondent) sets up
s possession as sufficient notice to the plaintiff of the defendant's
eged prior purchase. No other equity in his own favour, or
ud on the part of the plaintiff, is alleged or proved.

In many cases possession not properly accounted for may be a
ry material fact. But in the present case, the defendant had
ginally been a tenant of the jotedar,—the common vendor of
th parties,—and his possession was equally consistent with the
ntinuance of such tenancy, as with his alleged purchase. More-
r, it has been found as a fact by the Officiating Judge in the
urt below, that the defendant left the kabuliut of his tenancy
the hands of the common vendor. He ought, if and when he
de his alleged purchase, to have insisted upon the kabuliut
ng given up to him. By not having done so, he in fact helped
vendor to commit a fraud upon the plaintiff, for the production
this kabuliut to the plaintiff would be sufficient to satisfy him
the defendant's occupation was merely that of a tenant.

the present case, to say the least, the defendant can put
laim no higher than that he and the plaintiff are both in-
nt purchasers, and if that is so, the fact that the plaintiff did
er, while the defendant did not, is sufficient under section
compel us to hold that the plaintiff's registered deed must
l against the defendant's unregistered deed; and consequent-
der the circumstances, the decree of the Judge of Rung-
ill be upheld, and the decree of this Court reversed with

[CIVIL APPELLATE JURISDICTION.]

1879 April 17th.

No. 223 of 1877.

RUN BAHADOOR SINGH . . (PLAINTIFF) APPELLANT;

AND

MUSST. LUCHO COOWAR. . (DEFENDANT) RESPONDENT.

Act VIII of 1859, *section* 15—*Declaratory Decree—Adoption—Specific Relief Act, I of* 1877, *section* 42.

Under Act VIII of 1859, section 15, a suit will not lie at the instance of the reversionary heir, for a declaration that a certain letter, purporting to have been written by the husband of the defendant, empowering his widow to adopt a son is a forgery, and to have the same cancelled; and for an injunction restraining the adoption of a child under the letter.

Sreemutty Rajcoomaree Dossee vs. *Nobo Coomar Mullick*, 1 Boul., 137, followed.

See section 42 of Specific Relief Act, I of 1877, which has now been substituted for section 15 of Act VIII of 1859.

REGULAR APPEAL from a decision of the Subordinate Judge of Gya.

This was a suit brought by Baboo Run Bahadoor Singh, the brother of Baboo Murlidhur Singh, who died in 1279 F., without issue, leaving him surviving his widow, Mussamut Lucho Coowar, the defendant.

The plaintiff sought to obtain a declaration that a certain letter, dated 24th Kartick 1278 F., and purporting to have been written by the defendant's late husband empowering her to adopt a son to him, was a forgery; secondly, an order, setting aside and cancelling the same; and, thirdly, an injunction prohibiting the defendant from adopting any child under the letter.

Besides claiming as reversionary heir of his brother, the plaintiff alleged that the property of the deceased had been held jointly with himself. The widow denied that the property was joint. Litigation ensued, and in a suit by the plaintiff for possession of certain property left by Baboo Murlidhur Singh, the widow, by her written statement, filed on the 8th December 1876, alleged her possession of the letter in question giving her

power to adopt, and stated her intention of acting upon it. The letter was filed in the suit on the 17th January 1877, and on the 8th of March following the plaintiff instituted the present suit to set it aside as already stated.

Baboo *Mokesh Chunder Chowdhry*, Mr. *C. Gregory*, and Baboo *Ram Churn Mitter*, for the Appellant.

Woodroffe, Baboo *Kally Mohun Doss*, Baboo *Mohiny Mohun Roy*, and Baboo *Doorga Doss Dutt*, for the Respondent.

Baboo Mokesh Chunder Chowdhry.—This suit is not one of a purely declaratory character. The plaintiff not only prays for a declaration that the alleged authority to adopt is a false and fabricated document, but also for the cancellation of that document, and an injunction to restrain the defendant from adopting a son to her deceased husband on the strength of that document. A suit to set aside a deed is a suit for substantive relief—*Takoor Deen Tewarry* vs. *Nawab Syed Ali Hossein Khan*, 13 B. L. R., 427; S. C., 21 W. R., 340; *Joy Narain Giri* vs. *Grish Chunder Myto* and others, 22 W. R., 438.

Assuming that the conclusion arrived at in the regular suit brought by the plaintiff to recover possession from the defendant of the moiety of the estate to which her deceased husband was entitled, to be correct, and that the plaintiff and his deceased brothers were not joint in estate, the plaintiff as the reversioner, subject to the life interest of the defendant, can maintain this suit, so as to prevent its waste and alienation by being handed over by her to one who, when taken in adoption by her, would be a mere stranger owing to the falsity of the *onumutti-patro* set up by her—*Anund Mohun Mullick* vs. *Indromonee Chowdrain* and others, 16 W. R., 214. Suits by reversioners are distinguishable from other suits of a declaratory character, and are maintained *ex necessitate rei*—*Strimathoo, &c.*, vs. *Dorasinga Tevar*, 3 B. L. R., 83; S. C., 23 W. R., 314. Moreover, the question as to the right to maintain a suit of this character is concluded by cross authority—*M. S. Reg. Ap.* 53 *of* 1877.

Woodroffe.—Admitting that a suit to set aside a deed

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RUN BAHADOOR SINGH v. MUSSAMUT LUCHO COOWAR.

Argument.

is a suit for substantive relief, the actual relief granted is, and must in each case be, based upon a finding that there exists such a state of circumstances as to justify the cancellation of the deed sought to be set aside. In other words, the Court first makes a declaration as to the right of the plaintiff to have the deed set aside, and then passes on to grant the substantive relief consequential thereon, namely, the cancellation of the instrument. No such declaration can be made in this case. Whilst, on the one hand, Act VIII of 1859, section 15, does not deprive the Courts of this country of the power of granting a decree in any case in which, independently of that provision, they had power to do so—*Ram Nidhi Koondoo* vs. *Rajah Rughonauth Narain Mullo*, 15 B. L. R., 456, on the other, it leaves untouched the objection that may exist in the want of sufficient interest on the plaintiff to maintain such a suit, or in the absence of material parties interested in the question—*Sreemutty Rajcomaree Dossee* vs. *Nobo Coomar Mullick*, 1 Boul., 137. The appellant relies on *Anund Mohun Mondul* vs. *Indromonee Chowdrain*, 16 W. R., 214, as establishing that he has a sufficient interest to maintain this suit. It may well be questioned whether that case supports his contention, and it is doubtful whether, even in the case of there having been an adoption actually effected, he, as presumptive reversioner, could maintain a suit for the purpose of setting aside such adoption—*Rani Bromohmoyi* vs. *Raja Anund Lall Roy*, 13 B. L. R., 225, *note* 3, but, admitting that it does, there still remains the objection that the parties materially interested are not before the Court. The widow is a mere donee of the power. She does not claim any interest under the *onumutti-putro*; she may, and, if faithful to her deceased husband's wishes as expressed therein, will defeat her own estate—*Sreemutty Rajcomaree Dossee* vs. *Nobo Coomar Mullick, supra*. Such a declaration, as that sought for, would not be binding upon any son who might be adopted hereafter, and no such decree can be made until an adoption has actually taken place, and the adopted son been proceeded against—*Sreenarain Mitter* vs. *Sreemutty Kishen Soondery Dassee*, 11 B. L. R., 171; S. C., 19 W. R., 133. In all the cases, other than those brought by reversioners to

protect the estate, in which deeds have been set aside or declared inoperative, it will be found that the defendant claimed under them and interfered, or threatened to interfere, with some present right of property in the plaintiff. The unreported case was decided on the facts, and the observation of the Chief Justice is a mere dictum, and, it is respectfully submitted, inconsistent with the decisions of the Privy Council and the decisions in this and the late Supreme Court above cited.

Baboo *Mohesh Chunder Chowdhry* in reply.

The following judgment of the Court (1) was delivered by

AINSLIE, *J.* :— AINSLIE, *J.*

The question whether this suit will lie under section 15 of Act VIII of 1859 has been expressly answered in the negative by a judgment of the late Supreme Court in the case of *Sreemutty Rajcoomaree Dossee* vs. *Nobo Coomar Mullick*, 1 Boul., 137.

There is a recent decision of a Division Bench of this Court the other way, but the decision of the Privy Council in *Sreenarain Mitter* vs. *Sreemutty Kishen Soondery Dassee*, 11 B. L. R., 171, has not been considered in it, and this decision seems to us to establish that such a suit as the present, in which no conclusive declaration can be made, ought not to be allowed.

The 15th section of the Code of 1859 is no longer in force, and has been replaced with material variation by section 42 of the Specific Relief Act; thus the question, if it should again arise, will have to be considered with reference to the words of the new Act.

Under these circumstances, we think it unnecessary to refer the case to a Full Bench.

The appeal is dismissed with costs.

(1) AINSLIE and BROUGHTON, *J.J.*

[CIVIL APPELLATE JURISDICTION.]

1879
March 27th.

No. 2501 of 1877.

GOVIND PROSHAD ROY CHOWDHRY AND OTHERS . . . . . } APPELLANTS;

AND

ANUNDA CHUNDER CHOWDHRY AND OTHERS . . . . . } RESPONDENTS.

Evidence Act, I of 1872, *section* 92—*Kistibundi Bond—Contemporaneous Oral Agreement—Payment, Plea of.*

In a suit upon a kistibundi bond the defendants pleaded that the debt had been liquidated from the usufruct of certain property which by an oral agreement entered into at the time of the execution of the bond, had been assigned by them to the plaintiffs for that purpose. The assignment having been proved, the Court of First Instance, without further enquiry, dismissed the plaintiffs' suit. The District Judge, however, reversed the order of that Court, on the ground that under section 92, Act I of 1872, evidence of the alleged oral agreement was inadmissible, it being a contemporaneous agreement, varying and to some extent contradicting the terms of the kistibundi bond.

On appeal it was *held*, that the allegation of the defendants amounted merely to a plea of payment, and that section 92 of the Evidence Act was not a bar to an inquiry as to the foundation of such a plea; and the case was accordingly remanded for an enquiry to be made as to whether the whole or any portion of the kistibundi money had been liquidated from the profits of the lands assigned.

APPEAL from a decision passed by the District Judge of Furreedpore, reversing the decree of the Subordinate Judge of that district.

In this case the plaintiffs sued to recover Rs. 2,735-5-6 for principal and interest, alleged to be due upon a kistibundi bond, executed by the defendants in consideration of a previous loan.

By the terms of the bond the debt was to be re-paid by instalments; if default should take place interest was to be charged in a particular manner agreed upon. Each payment was to be endorsed upon the bond, and a payment not so endorsed should not be binding.

The execution of the bond was admitted, but the defendants pleaded that the loan had been fully re-paid by the usufruct of

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Statement.

certain landed property which they had assigned to the plaintiffs, or allowed to remain in their hands according to an oral arrangement entered into at the time of the execution of the bond, for the purpose of paying off the debt.

The plaintiffs, who were found to be in possession of the properties in question, claimed to hold portion of them as their absolute right under a mortgage which they had foreclosed; the remainder, they alleged, had been conveyed to them under a kobalah, dated 6th Kartick 1275.

In support of their contention, a copy of a decision of the Moonsiff's Court was filed, showing that they had there been held to have acquired an absolute right in portion of the lands. The defendants, on the other hand, asserted in their written statement that, previous to the kistibundi bond, they had been in the habit of allowing their lands to remain in the benamee names of the plaintiffs, and a copy of another decision of the Moonsiff was put in, from which it appeared that the kobalah of 6th Kartick 1275, under which the plaintiffs claimed to hold certain of the lands as abovementioned, was a benamee transaction.

The Subordinate Judge disagreed with the conclusion of the Moonsiff as to the alleged foreclosure of the mortgage over portion of the lands, and allowed evidence to be given of the assignment set up by the defendants, and upon that evidence found that the assignment was sufficiently established, and, therefore, dismissed the suit.

The District Judge reversed the decision of the Subordinate Judge, on the ground that section 92 of the Evidence Act precluded the Court from taking evidence as to the arrangement by which the loan was to be re-paid from the usufruct of the properties made over by the defendants to the plaintiffs.

The defendants appealed to the High Court.

Baboo *Kashee Kant Sen*, for the Appellants.

Baboo *Sree Nath Dass*, and Baboo *Taruck Nath Palit*, for the Respondents.

The judgment of the High Court (1) was as follows :—

"This is a suit on a kistibundi bond.

BIRCH and MITTER, *J.J.*

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Judgment.

The defendants' answer seems to us to be one of payment. They allege that, for the liquidation of the money due under the document in question, certain properties of the debtors were left in the possession of the creditors, and that the debt was paid off from the usufruct of these properties.

The Subordinate Judge was of opinion that the arrangement set up by the defendants was proved. Upon this finding alone, he dismissed the plaintiffs' suit, because (as he says) "there is no opportunity in this case to consider whether the debt has been fully realized, because the plaintiffs deny the assignment." We do not think that the Subordinate Judge was right in taking this view of the case. Before the suit could be dismissed on the ground that the kistibundi money had been paid off from the usufruct, the defendants were bound to give some evidence of that fact.

On appeal, the District Judge has reversed the decree of the lower Court. He is of opinion that defendants in their written statement have set up a contemporaneous oral agreement to vary, and in some respects to contradict, the terms of a written instrument, viz., the kistibundi bond. He, therefore, thinks that they cannot be allowed to do so under the provisions of section 92 of the Evidence Act. Without, therefore, entering into a consideration of the evidence upon this point, he has disallowed the objection and decreed the suit.

We are of opinion that the District Judge has not taken a correct view of the objection put forward by the defendants in their written statement. If the contention of the defendants had been that by a contemporaneous oral agreement the plaintiffs had, contrary to the stipulations of the kistibundi bond, themselves to be re-paid only from the usufructs of certain properties, the possession of which was transferred to them, and that whether the money had been actually paid off or not, they were bound by that oral agreement, and could not therefore maintain the suit, the objection would have been of the nature supposed by the District Judge. But their answer to the suit is not of this character. Their contention is, that under an assignment of rents and profits of certain properties, the details of which were orally settled between the parties, the debt has been paid off. This is a plea

of payment, and must be enquired into. The provisions of section 92 of the Evidence Act constitute no bar to this enquiry.

But in two other suits finally decided between the parties, it has been held that some time before the date of the kistibundi, a certain share of the properties, the rents and profits of which are alleged to have been assigned, had become the absolute property of the plaintiffs under a foreclosed mortgage. And as regards the remaining share, it has been also decided that some of the defendants are still the owners of it. It is not disputed that from the date of the kistibundi the plaintiffs have been in possession of it. It is covered by a kobalah, dated the 6th Kartick 1275, which has been found to be a benamee instrument. As regards this latter share, we are of opinion that the defendants' objection must be enquired into. Before we can dispose of this special appeal, we must have the finding of the lower Appellate Court upon this point. We, therefore, remit the following issue to the District Judge for a finding:—Whether the whole or any portion of the kistibundi money has been liquidated from the profits of the properties covered by the benamee kobala of the 6th Kartick 1275.

The parties will be at liberty to adduce evidence upon this issue. And as the plaintiffs have been admittedly in possession, the duty of adducing evidence to prove what these profits were, will specially devolve upon them. But if they fail to adduce satisfactory evidence, the defendants would not be benefited by this remand, unless they give some evidence upon the point.

The special appeal will be finally disposed of after the finding and the evidence are sent up. We reserve the question of costs incurred in this hearing.

[FULL BENCH.]

1879 *February* 4*th.*

Nos. 1867 and 1868 of 1877.

NISTARINI DASI . . . . . (PLAINTIFF) APPEL

AND

BONOMALI CHATERJEE AND ANOTHER. . . . . (DEFENDANTS) RESI

DINONATH BOSE AND ANOTHER . (PLAINTIFFS) APPI

AND

BONOMALI CHATERJEE AND ANOTHER . . . . . (DEFENDANTS) RESI

Suit for Increased Rent—Express Agreement—Notice—Act VIII 1869, *section* 14.

Where lands are held under a pottah by the express term: rent is payable at certain rates upon the quantity of land th found on measurement, if, on measurement being made, it i: ed that a larger area exists than that in respect of whic hitherto been paid under the pottah, the landlord is entitle an increased rent in proportion to the larger area, without s tenant with notice under section 14 of Act VIII (B.C.) of 18

REFERENCE to a Full Bench in Appeals from a passed by the Subordinate Judge of Jessore, reversing t of the Moonsiff of Baghat.

These appeals having come on for hearing on the 31st 1879 by Mr. Justice MITTER and Mr. Justice PRINSEP, th ships referred them to a Full Bench with the following re

MITTER, *J.* MITTER, *J.* :—

The plaintiffs, in special appeals Nos. 1867 and 1 the owners of a janti tenure in proportion of 7½ and shares respectively.

These suits were brought to recover the arrears of ren of a holding subordinate to this janti tenure. The su holding in question was created by a lease in the ye There is a stipulation in the lease that the tenants are pay at the rate of Re. 1 per beegah for bhittee and 14 beegah for paddy lands upon the whole quantity that found on measurement.

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Remarks.

It is not disputed that the rent payable on account of this holding in the year 1278 was Rs. 301. The landlords obtained a decree at that rate for the year 1278 against the tenants. In execution of this decree, the holding in question was put up to sale and purchased by the defendants in the beginning of 1279.

These two suits have been brought upon the allegation that this subordinate holding was measured in the year 1278, and that, according to the result of that measurement and the stipulation of the lease of 1253 referred to above, the plaintiffs are entitled to recover rent at the rate of Rs. 604-3-5.

The defendants, amongst other things, plead (1) that a suit for rent at a higher rate than what was payable in the previous year, cannot be maintained without notice; (2) that the plaintiffs' allegation of a measurement in 1278 is not true; (3) that the holding does not contain the quantity of land mentioned in the plaint; (4) that a suit for enhancement of rent of a fractional share of the tenure will not lie; and (5) that the plaintiffs having caused the holding to be sold, describing its rent to be Rs. 301, cannot recover at a higher rate.

The Moonsiff overruling all those objections awarded a modified decree in favor of the plaintiffs.

On appeal the Subordinate Judge has overruled the objection No. 4, and without expressing any decisive opinion upon the other pleas, has disallowed the claim for higher rent, upon the ground of want of notice.

The plaintiffs have appealed against this judgment, and the defendants before us have raised certain objections against the maintenance of the suit. The defendants' objections are: (1) that a suit for enhancement of rent by the owner of a fractional share of the superior tenure is not maintainable; and (2) that the plaintiffs, having caused the holding to be sold, describing it as bearing Rs. 301 annual rent, are not entitled to demand a higher rent.

We think that both these objections are untenable. As regards the first contention, the lower Courts find that the co-sharers collect separately their respective shares of the rents. These suits, having been brought to recover arrears of rent under the original contract by which the tenancy was created, are not governed by the late Full Bench decision on this subject.

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On the other hand, the rulings of this Court that under similar circumstances a suit by a co-sharer for his share of the rent is not open to any objection, applying to these cases.

We think also that the other objection ought not to prevail, because the defendants, purchasers, are bound by the conditions of the original grant creating the tenancy.

We, therefore, over-rule both these objections taken by the defendants.

The plaintiffs contend in special appeal that the lower Court's decision is erroneous in law.

That having regard to the express stipulation in the pottah of 1253, they are entitled to enhance the rent of the tenure, without serving a notice upon the tenants under section 14 of Act VIII (B. C.) of 1869. They rely upon two decisions of this Court, reported in 17 W. R., 258, and 19 W. R., 108, in support of their contention.

The respondents, on the other hand, have cited before us two reported decisions from 4 W. R., Act X Rulings, 35, and I. L. R. 3 Cal., 271. They also rely upon an unreported decision of this Court, dated the 2nd January 1878, in special appeals Nos. 921, 922 and 923 of 1877.

On referring to these cases, we find that there is a conflict in the decisions of this Court upon the point raised before us. As the question involved in this point is of importance, we think it right to refer it to a Full Bench.

The question referred is, whether, in accordance with the express stipulation of the pottah of 1253, the plaintiffs in these cases are entitled to recover rent for the year 1279, at a higher rate than what was payable in the year preceding without serving upon the tenants any notice under section 14 of Act VIII (B. C.) of 1869.

PRINSEP, *J.*

PRINSEP, *J.*:—

I agree in referring this matter for decision by a Full Bench, but I would state that it has recently been decided by myself, sitting with Mr. Justice MORRIS, (Sp. App. 759 of 1878) the conflict of judgment of this Court not being then brought to our notice.

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Judgment.

Baboo *Mohiny Mohun Roy*, and Baboo *Bungshidur Sen*, for the Appellants.

Baboo *Chunder Madhub Ghose*, and Baboo *Greeja Sunker Mozumdar*, for the Respondents.

The Full Bench (1) on the 4th February 1879 delivered the following judgment:—

We are of opinion that under the circumstances stated it was not necessary for the plaintiffs to give any notice under section 14 of Act VIII (B. C.) of 1869, before bringing a suit against the defendant for the increased rent.

It is apparent from the language of the section itself, as well as from other provisions in the Act, that section 14 was never intended to apply to a case like the present.

Immediately upon the measurement being made between the parties, and the extent of the cultivated land ascertained, the defendant, by the express terms of the contract of tenancy, would have to pay an increased rent in proportion to the increased area brought into cultivation, whereas if the provisions of section 14 were binding upon the plaintiffs, the increased rent would become payable, not from the time of the measurement, but from the expiration of the notice to be given under that section.

We think, therefore, that the question referred to us should be answered in the affirmative: and as the Subordinate Judge has decided against the plaintiff, upon the ground that no notice was given without trying the 6th and 7th issues, which relate to the measurement, the case must be remanded to the lower Court for the trial of those issues.

(1) GARTH, *C.J.*, JACKSON, PONTIFEX, BIRCH and MITTER, *J.J.*

[ORIGINAL CIVIL JURISDICTION.]

1879 *April 7th.*

MECKJEE KHETSEE AND OTHERS . . . . PLAINTIFFS ;

AND

KASOWJEE DEVACHUND . . . . . DEFENDANT.

Stay of proceedings in one of two suits in respect of same subject-matter different Courts—Act X of 1877, *section* 20.

A, who was employed by B. & Co. as their agent at Calicut, institu a suit for the balance of an account against his principals in the Cour the Subordinate Judge there in July 1878. In December of the sa year, B. & Co. instituted the present suit against A, for an account, a for damages caused by his alleged negligence.

Held, that as in both suits practically the same issues were trial A was entitled, as having been first to institute his suit, to proceed the Court in which he had chosen to bring his suit, and to have the otl suit stayed, but without prejudice to the right of the plaintiffs in latter suit to institute a cross claim in the Calicut Court.

THIS was an application by the defendant to stay proceedir under the following circumstances: The plaintiffs, who w merchants in Calcutta, and the defendant, stood with regard each other in the position of principals and agent, the lat being employed to sell goods for the former in Calicut. In Ju 1878, the defendant instituted a suit before the Subordinate Jud of Calicut against his principals for the balance of an account respect of their dealings with him. In that suit the defendan (the plaintiffs in the present suit) entered an appearance and p in a written statement, and on the 4th of December settle the following issue, viz :—Whether the defendants are indebte to the plaintiff in the sum of Rs. 6,654-10-0 in connection wit the admitted dealings between them.

On the 5th December the present suit was filed, and a summon was served on the defendant some time during the same month. O the 25th March 1879, the defendant was ordered to file a writte statement within six weeks, in default of which it was directe that the suit should be transferred to the undefended board. O the 29th of the same month a further order was made, directin the defendant to file an affidavit of documents.

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MECKJEE KHETSEE v. KASOWJEE DEVACHUND.

Judgment.

To stay proceedings in the suit here an application was now made by the defendant.

Trevelyan, for the defendant, contended that inasmuch as practically the same issues were triable in both suits, and as his client had been first to file his suit, proceedings in this Court should be stayed.

In suits of this nature, books and accounts were very material, and very great inconvenience might arise in respect of the production of the documentary evidence if the two suits were allowed to proceed together.

Phillips (*contra*), contended that inasmuch as this application had not been made at the earliest opportunity, the Court ought not to order stay of proceedings in this suit. Section 20 of the Code of Civil Procedure provides that every application of this nature must be made by the defendant at the earliest opportunity, otherwise the defendant shall be deemed to have acquiesced in the institution of the suit.

[PONTIFEX, *J.*:—It seems to me that one of the suits must be stayed. The suit in the Calicut Court was instituted first, and priority of time is the proper guide in determining which suit should be allowed to proceed. The same rule as to priority obtains in England, where suits in respect of the same subject-matter might be set down in Rolls Court, or in any of the Courts of the Vice-Chancellors.]

That is in the case of identical suits being instituted in different Courts. In the case before us the suits are different. The suit here covers a much larger area than the other. Besides, an account can be taken more easily here, and generally the balance of convenience is in favor of this suit being allowed to proceed while the other is stayed.

Trevelyan in reply.

The following judgment was delivered by

PONTIFEX, *J.*:— PONTIFEX, *J.*

In this case the plaintiffs sue the defendant, who was their agent, employed to sell goods for them at Calicut for an account, and for damages alleged to have been caused by his negligence.

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Judgment.

PONTIFEX, J.

It appears that in July last year the defendant filed a suit in the Court of the Subordinate Judge of Calicut, against his principals, claiming a balance due upon an account, and that in that suit the defendants (the plaintiffs here) entered appearance and filed a written statement. On the 4th of December issues were framed. The present suit was not filed until the 5th December.

Now it is quite clear that these two suits, to a very great extent, cover the same ground, and it is impossible that they should proceed together, as many inconveniences might arise; amongst others, difficulties in connection with the filing of documents and the taking of accounts. An application has already, on the 29th March, been made to file a list of documents in the suit here. A further inconvenience, the possibility of which ought to be avoided, would arise should there be a conflict of decisions here and in the Calicut Court. For these reasons, therefore, one of the suits must be stayed.

The defendant argues that his suit covers more ground than the Calicut suit, and that evidence can be more conveniently taken here. As to this, however, it is impossible now to decide. I think, therefore, it will be necessary to follow the general rule, that the plaintiff who first brings his suit, claiming an account in respect of any particular transactions, has a right to have that account taken in the Court in which he has chosen to bring his suit. Moreover, the plaintiff in the Calicut suit has been first to apply to stay proceedings, for so far the plaintiff in this Court has made no similar application in the Calicut Court for stay of proceedings there.

The suit here will be stayed until after the decree in the other suit, but without prejudice to the plaintiffs' right to file a cross suit in the Calicut Court.

[CRIMINAL APPELLATE JURISDICTION.]

EMPRESS . . . . . 1879 *April 22nd.*

AND

ROHIMUDDIN AND OTHERS . . . . . .APPELLANTS. No. 191 of 1879.

Indian Penal Code, Act XLV of 1860, *section* 300, *Except.* 5—*Culpable Homicide—Consent, Risk of death taken by.*

Where a person knowing that there is a likelihood of his being killed, deliberately engages with others in a fight with deadly weapons and is killed, he cannot be said to have "taken the risk of death with his own consent" within the meaning of exception 5 of section 300 of the Indian Penal Code, and the persons taking part in the fight are liable to be tried under sections 149 and 302 of that Code for murder.

Per AINSLIE, *J.*:—The 5th exception to section 300 of the Indian Penal Code applies to cases where a man consents to submit to the doing of some particular act, either knowing that it will certainly cause death, or that death will be likely to be the result.

CRIMINAL APPEAL from a conviction by the Sessions Judge of Backergunge.

The facts are fully set forth in the following judgments of the Court (1):—

AINSLIE, *J.*:— AINSLIE, *J.*

The Judge and Assessors have concurred in finding the prisoners guilty of culpable homicide not amounting to murder, committed in the course of a riot, and they have been sentenced under section 304 of the Indian Penal Code, read with section 149.

Other persons had been previously tried and convicted on account of the same matter. They were convicted of murder under section 302, read with section 149, and the conviction and sentence were affirmed by this Court on the 12th November 1878.

In the present trial the Officiating Judge has held that the case comes under the 5th exception of section 300 of the Penal Code. Culpable homicide is not murder when the person whose death

(1) AINSLIE and BROUGHTON, *J.J.*

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Judgment.

AINSLIE, *J.*

is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

He says that "one of a body of professional *lathiyals*, armed with deadly weapons, is killed in a fight which these *lathiyals* have voluntarily entered into and provoked; his death cannot be murder: And in a previous passage he says:—"They were not obliged to fight for the defence of person or property, but they provoked the fight and entered upon it willingly and with pre-consent. They were professional *lathiyals*, armed with spears, and their adversaries were also armed with spears. They were well aware of the risk they ran, and by their conduct showed that they took that risk willingly."

The facts are briefly these: That certain persons who may be called Lushker's party, to which the prisoners belonged, went armed with spears and latties, to plough lands, claimed by one Addool Ruheem Khondkar. The latter gathered men, and there was a disturbance and clods were thrown, but by the mediation of some bystanders a separation was effected.

Lushker's party began to withdraw, whereon Khondkar's party taunted them, and some violence was used towards one Hurri who was removing his plough. On this Lushker's party returned; some of Khondkar's men prepared themselves for fighting, and a fight occurred, in which Assuruddeen, one of Khondkar's party, was killed by several spear wounds, and another man was wounded.

The evidence shows that these men made deliberate preparations to meet the attack of Luskher's men, and that the case cannot come under exception 4th as a sudden fight in the heat of passion upon a sudden quarrel.

The assailants, in the first instance, had gone out armed with deadly weapons, and at the later stage at which the fight occurred, fighting was deliberately intended by both parties.

I cannot concur in the view taken by the Judge that, when persons of full age voluntarily engage in a fight with deadly weapons, they take the risk of death with their own consent; and that as a consequence culpable homicide occurring in such a fight is not murder.

If this view is correct, the 4th exception would be superfluous. If culpable homicide in a premeditated fight with deadly weapons

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AINSLIE, *J.*

is not murder, *a fortiori* unpremeditated culpable homicide in a sudden fight in the heat of passion upon a sudden quarrel would not be murder. It seems to me that the 4th exception clearly indicates that culpable homicide in a fight is murder, unless it is unpremeditated, and the fight is such as is therein described, sudden in the heat of passion and on a sudden quarrel. A fight is not, *per se*, a palliating circumstance; only an unpremeditated fight can be such. Where persons engage in a fight under homicide circumstances which warrant the inference that culpable is premeditated, they are responsible for the consequences to their full extent.

I do not think that the 5th exception has any application to such a case. I understand that exception to apply to cases where a man consents to submit to the doing of some particular act, either knowing that it would certainly cause death, or that death will be likely to be the result, but that it does not refer to the running of a risk of death from something which a man intends to avert, if he possibly can do so, even by causing the death of the person from whom the danger is to be anticipated.

The extract from the report of the Indian Law Commissioners, given in Morgan and Macpherson's Edition of the Penal Code, at page 265, contains instances to which the exception applies, and, in my opinion, cases of this character only are properly to be dealt with under it.

The Judge ought to have convicted the prisoners under section 302, read with section 149, Penal Code, and sentenced them accordingly.

BROUGHTON, *J.*:—

BROUGHTON, *J.*

I also think that the prisoners ought to have been convicted of murder under section 302, coupled with section 149, of the Indian Penal Code. The common object of the men assembled may have been in the first instance merely the ejectment of the other party from the land, but they had retired, and, at the instance of mediators, had given up that object. Afterwards, the other party challenged them to come on again, and the deceased man and [illegible], armed with spears, put themselves in a fighting position awaited the return of the prisoner's party. They returned,

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Judgment.

BROUGHTON, J.

some of them also being armed with spears, and accepted the challenge. The object of those who returned, and among them were the prisoners, was not then to eject the others from the land, but to engage in a deadly fight with spears. A man may be a member of an unlawful assembly as defined in section 141, and if armed with a deadly weapon, may be punishable under section 144, although no force has been used. If any force is used, he may be punishable under section 148, and if he be a member of a band of dacoits and murder is committed, he may be punished under section 396, and in this case there may be no deadly weapon used; if a deadly weapon is used, he may be punished under section 398: all these instances show that the common object or intention of the assembly may be various, and that it must be judged from the proved circumstances of the case.

In the present case the common object or intention of the assembly was clearly to fight in such a way that the weapons they used would be likely to cause, and probably would cause, the death of one of their number or of one of their opponents.

It is said by the Sessions Judge, that the man who was slain invited or ran the risk of death, and that this brought the case within exception 5th of section 300 of the Indian Penal Code. But if that exception applies to the case, there appears to be no reason for exception 4th.

Where there is a fight between two contending parties, it is necessary, in order to apply exception 4th, that the fight should have been sudden and without premeditation; and a fight under any circumstances comprehends the kind of consent to which the Sessions Judge alludes. Here there was a certain time between the challenge and the fight, a short time it may be, but time for reflection; the parties were at a distance from each other when the challenge was given, and consequently had time to consider whether they would engage in the fight with deadly weapons or not. They determined to fight, and the death of one of the men was the result.

Exception 5th appears to me to apply to circumstances of a different character, as for instance to a case of suttee, not to a premeditated fight.

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Judgment.

BROUGHTON, *J.*

The prisoners have appealed; they say the evidence is not conclusive, and Nazir Mahomed says he had witnesses to prove an *alibi*. Witnesses were examined for the defence, and it does not appear that any were excluded. These witnesses support the case for the prosecution which is moreover proved by the testimony of wholly independent witnesses, namely, by the men who offered to mediate, and did in fact effect a cessation of hostilities between the contending parties. The Sessions Judge rightly says that the facts are clearly proved by the witnesses on both sides. That on the question, whether the offence was murder or culpable homicide not amounting to murder, I agree in the thinking that the Sessions Judge was mistaken. The case in my opinion is a case of murder, and that being so, the prisoners must be sentenced under the circumstances to transportation for life.

We annul the conviction and sentence passed by the Officiating Sessions Judge of Backergunge, and convict the prisoners, Rohimuddin, Nazir Mahomed and Sumeruddin of the murder of Assuruddin, an offence punishable under section 302 of the Indian Penal Code, and sentence them to transportation for life.

[TESTAMENTARY AND INTESTATE JURISDICTION.]

1879
May 8th.

IN THE GOODS OF RAMCHAND SEAL . . . DECEASED.

Administration, Grant of Letters of, to Hindus—Letters of Administration limited to particular property, whether granted.

Where the representatives of a Hindu intestate, having obtained possession of the moveable property, applied for Letters of Administration limited to the moveable property left by the deceased, it was *held* that Letters of Administration so limited could not be granted.

IN this case an application was made by the five sons of the late Ramchand Seal for Letters of Administration to his estate. The deceased died on the 31st of December 1878, leaving him surviving a widow and the five sons mentioned, his sole heirs and representatives.

The petition upon which the application was made stated that the deceased left certain Government securities and shares in Limited Companies, and that it would be necessary that Letters of Administration should be granted, to enable his representatives to deal with, and realize the interest and dividends on the same. as also to get in certain claims and dues (mentioned in the schedule annexed) owing to the estate.

It was further stated that Ramchand Seal, at the time of his death, was possessed of considerable immoveable property, situated in Calcutta, but that this property had already come into the hands of the petitioners, and the tenants had recognized their title and attorned to them.

Bonnerjee (for the Petitioners) asked that, under the circumstances Letters of Administration, limited to the personal property of the deceased, might be granted. It was unnecessary, he urged, that Letters of Administration should be taken out as to the immoveable property, for that was already in the possession of the sons of the deceased.

It was not compulsory for Hindus to take out Letters of Administration to the estates of intestates, and where they did so, it was only fair that they should be made to pay in proportion to the

benefit to be derived from the grant of letters. There was nothing to be gained by taking out Letters of Administration to the immoveable property. If it had been the object of the Legislature to tax the estates of intestate Hindus, the section (190) in the Succession Act, which makes the taking out of Letters of Administration compulsory, would not have been omitted from the Hindu Wills Act, as it had been.

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In re RAMCHAND SEAL.

Judgment.

PONTIFEX, *J.* :—

PONTIFEX, *J.*

If Hindus take out Letters of Administration at all, they must take out general letters. I cannot grant you Letters of Administration limited as you wish them.

[CIVIL APPELLATE JURISDICTION.]

MOULVIE OMER KURIM . . (DEFENDANT), APPELLANT;

AND

LALA SHEWAN LALL. . . . (PLAINTIFF), RESPONDENT.

March 20th.

No. 2532 of 1877.

Small Cause Courts—Jurisdiction.

A suit to obtain an order from the Court that a decree upon a mortgage of a certain house should be enforced against the person and property of the defendant, who had purchased the house at auction subject to the plaintiff's mortgage, but had subsequently removed the materials of the same and so deprived the plaintiff of his lien thereon, not being a claim for debt, damages, or for the recovery of property, is not cognizable by a Court of Small Causes.

APPEAL from a decision passed by the Officiating Judge of Patna, reversing the decree of the First Sudder Moonsiff of that district.

The facts were these:—In 1867, one Kherodhur Pasi mortgaged a certain kutcha tiled house to the plaintiff by a bond, dated 28th March. This house was subsequently brought to auction and sold subject to the mortgage. The defendant became the purchaser, and took possession of it.

Some time afterwards the plaintiff instituted a suit against

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MOULVIE OMEE KURIM v. LALA SHEWAN LALL.

Statement.

Kherodhur Pasi, the mortgagor, and the present defendant, the auction-purchaser, for the recovery of the money secured by the mortgage bond of 28th March, and obtained a decree. By the decree it was ordered that the money due under the decree should be realized in the first instance from the mortgagor, and that in default, the mortgaged property should be sold, and the proceeds applied in payment of the amount due.

The plaintiff failed to satisfy his decree by proceedings against Kherodhur Pasi, and applied to, and obtained an order from, the Court for the sale of the mortgaged house. The actual sale was, however, postponed on several occasions, and meanwhile, the defendant removed the materials of the house. The proceeds of the sale of the site of the house having been insufficient to satisfy the decree, an application was made for an order that the balance still due might be realized from the person and property of the defendant, but was refused by the execution department on the 24th January 1878. The plaintiff thereupon instituted this suit, praying for a similar order, on the ground that the defendant by appropriating the materials of the mortgaged house had deprived him of his right to have his decree satisfied from the proceeds of the sale of the house.

Evidence was given that the materials had been carried off by the defendant's servants, but the Moonsiff was not satisfied that this had been done by the express orders of the defendant, and upon this ground, and the further ground that the plaintiff had not proved the value of the materials removed, he dismissed the suit.

The District Judge, however, was of opinion that, looking at the written statement of the defendant, which made no attempt to explain the disappearance of the house, and the evidence given on behalf of the plaintiff, there could be no doubt that the materials had been removed by the express order of the defendant, and as he found that the amount claimed by the plaintiff corresponded with the difference between the bid at the sale of the site of the house after the removal of the materials, and a bid at a former sale of the same house before the removal, he gave the plaintiff a decree for the relief sought.

The defendant appealed to the High Court.

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MOULVIE OMER KURIM v. LALA SHEWAN LALL.

Mr. *M. L. Sandel*, for the Appellant.

Baboo *Guru Doss Banerjea*, for the Respondent.

The judgment of the High Court (1), which was as follows, was delivered by

Judgment.

GARTH, *C.J.*

GARTH, *C.J.*:—

A preliminary objection has been raised in this case by the respondent that no appeal lies, because the suit was one which might have been tried by the Court of Small Causes. But when we come to look at the real nature of the claim, we think there is nothing in the objection.

It was not a claim for debt, or for damages, or for the recovery of property, but to obtain an order from the Court, that the amount of certain decrees should be enforced against the defendant's person and property, because he had, by removing a house which was the subject-matter of the plaintiff's mortgage, deprived the plaintiff of the lien upon that house, to which he was entitled.

It is clear that this was not a suit cognizable by the Small Cause Court.

The appellant then contends that the judgment of the lower Court is erroneous, because the defendant is not shown to have removed the house itself, but only to have carried away the materials; and that he ought, at any rate, only to be answerable to the extent of the value of those materials.

But these points were never raised in the Court below. The issue raised there was, whether he had carried off the materials. The defendant never based his defence upon any other ground; and he never suggested that the value of the house was less than the sum due upon the decrees.

It was proved in point of fact that he did remove the materials; and as he was clearly a wrong-doer in this respect, and has given no evidence of the value of the materials, we cannot say that the Court below was wrong in making him liable to the full extent.

The decree made by the District Judge is not very explicit,

(1) GARTH, *C.J.*, and PRINSEP, *J.*

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but we presume he intended to order, that the unpaid amount of the decrees is to be realized from the defendant's person and property.

We think that he was justified in making this order, and we dismiss the appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

April 7th.

No. 161.

GOSSYEN LUCHMEE NARAIN POORI . . . . . (DECREE-HOLDER), APPELLANT;

AND

BICRAM SINGH . . . . (JUDGMENT-DEBTOR), RESPONDENT.

Mortgage Decree—Apportionment of debt between separate mortgaged properties.

One of two mouzahs, upon a mortgage of which A had obtained a decree with an order for sale of the mortgaged properties, was attached in execution of another decree and sold subject to the first decree. A became the purchaser, and now sought to execute his decree by the sale of the second mouzah, claiming to charge his entire debt upon that village.

Held, that he was bound to give credit for the proportionate share of the debt assignable to the first mouzah, and entitled only to execute his decree against the second village for the amount chargeable thereon.

Nawab Uzimut Ali Khan vs. *Jowahir Singh*, 13 Moore's I. A., 404, cited.

APPEAL from an order passed by the Judge of Gya, affirming the order of the Officiating Subordinate Judge of that district.

Baboo *Chunder Madhub Ghose*, and Baboo *Prannath Pundit*, for the Appellant.

Baboo *Jogesh Chunder Dey*, for the Respondent.

The facts are sufficiently set forth in the judgment of the Court (1), which was as follows:—

The appellant lent money to the respondent, who, as security for the repayment of it, pledged two villages, Nowadih and Pali. The appellant eventually sued on his bond, and obtained a decree,

(1) AINSLIE and WILSON, *J.J.*

in which was embodied an order for the sale of the pledged properties.

Before this order was enforced, another creditor, in execution of a decree for money, attached Nowadih, and caused it to be put up for sale. Thereupon the appellant gave notice of his claim and set up his right to charge the entire debt due to him to this property. The consequence was, that it was ordered to be sold subject to his claim, and at the execution sale he became the purchaser, for a comparatively small sum, of the rights and interests of the debtor.

He now seeks to execute his decree by the sale of Mouzah Pali, and claims to charge the entire debt to that portion of the mortgaged property. On the other hand, the debtor demands that Nowadih shall be first resold, and that Pali shall only be sold in the event of there being a balance unrealized by the sale of the other village.

In the case of *Nawab Uzimut Ali Khan* vs. *Jowahir Singh*, 13 Moore's I. A., 404, the Privy Council held that when in execution of a decree, property subject to a mortgage was sold in several parcels and purchased by several persons, one parcel being purchased by the mortgagee himself, the purchaser of a parcel was entitled to redeem on taking an account of the whole debt, and a valuation of the several parcels and payment of his proportion of the debt. This decision in effect disposes of both claims. The mortgagee is clearly bound to give credit for the share of the debt assignable to Mouzah Nowadih, and the purchaser is not entitled to ignore the sale of that village at the instance of another creditor, and to demand a resale under this decree.

An account must be taken of the relative values of the mortgaged properties, and the debt apportioned accordingly. This being done, the judgment-creditor will be at liberty to proceed to execute his decree for the sum chargeable upon Mouzah Pali by sale of that village. The orders of the lower Courts are set aside. The Subordinate Judge will allow the appellant a reasonable time to continue proceedings in execution of his decree in the mode indicated.

Both parties being equally wrong in their demands, we think that there should be no order for the costs of this appeal.

[CIVIL APPELLATE JURISDICTION.]

1879
March 31st.

No. 1736 of 1878.

KOONJO BEHARY SINGH . . . . . APPELLANT;

AND

RAJAH NILMONEY SINGH DEO BAHADOOR . . . . . RESPONDENT.

Set-off—Plea of Payment.

In a suit by a zemindar for arrears of rent, the defendant alleged that his tenure had been placed under the management of the Collector, and had so remained for a number of years, and that the Collector, from money realized by him as manager, had, in addition to satisfying all other claims of the plaintiff, paid the rents accruing, not only during the period of his management, but up to, and inclusive of, the years, the arrears of rent for which were claimed in the suit.

The lower Court refused to consider the defendant's plea, on the ground that it was in the nature of a set-off, and that not being a debt due from the plaintiff to the defendant, it was not such a set-off as could be allowed by the Court.

Held, that the plaintiff's plea was a plea of payment merely and not in the nature of a set-off.

APPEAL from a decision of the Officiating Judicial Commissioner of Chota Nagpore, reversing that of the Deputy Collector of Manbhum.

Baboo *Umbica Churn Bose*, and Baboo *Pran Nath Pundit*, for the Appellant.

Baboo *Bhobany Churn Dutt*, for the Respondent.

The facts are sufficiently set forth in the following judgment of the High Court (1) which was delivered by

MITTER, *J.* :—

MITTER, *J.*

This suit was dismissed by the Court of First Instance, and the lower Appellate Court has reversed the judgment of the first Court.

(1) BIRCH and MITTER, *J.J.*

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KOONJO BEHARY SINGH v. RAJAH NILMONEY SINGH DEO BAHADOOR.

Judgment.

MITTER, J.

The plaintiff claims to recover arrears of rent for the years 1281 and 1282. It is admitted before the lower Appellate Court that the annual rent of the tenure in the possession of the defendant is Rs. 673-9-6. The defendant's objection to the suit is, that the whole tenure was in the custody of the Collector from the year 1270 to 1279, and that the Collector, from the proceeds thereof, paid Rs. 12,651-1-10 to the plaintiff in this suit, on account of a decree which the plaintiff held against the defendant, as well as on account of rent. The defendant's plea is, that this amount, Rs. 12,651-1-10, was not only sufficient to pay off the money due under the decree, but also the rent of the tenure, including the rent for the years in question.

The Deputy Collector found that the defendant's objection was substantiated. On appeal, the Officiating Judicial Commissioner has declined to go into this objection, upon the ground that the defendant's plea is one of set-off, and it could not be allowed, because no sum certain was alleged to be due to the defendant from the plaintiff, and also because "the cross demand," as he calls it, was in no sense of the term a "debt."

We think that the Officiating Judicial Commissioner has entirely misapprehended the nature of the defendant's objection. He does not claim to set-off a cross demand against the plaintiff's claim, but pleads payment. What the defendant states is simply this—that the Collector was in charge of his property on his behalf from the year 1270 to the year 1279 and that the Collector on his (defendant's) behalf has paid the rent which is the subject-matter of this suit. It is clear that this is not a plea of set-off, but one of payment. Therefore the decision of the Judicial Commissioner cannot stand. We accordingly set it aside and remand the case to him for retrial.

2nd. MOHUNT CHUTTERBHUJ BHARTI (DEFENDANT) APPELLANT;

AND

04 of 78. JANKI PROSAD SINGH ... (PLAINTIFF) RESPONDENT.

Gorabundi Tenure, Nature of—Transfer of Gorabundi tenure—Onus of Proof.

The *onus* lies upon a plaintiff claiming, in virtue of a purchase of the tenure from the former holder, to be entitled to possession of *gorabundi* lands, to prove that such lands are transferable.

Per curiam: There are no decided cases, nor is there any evidence to show either that *gorabundi* rights are more extensive than rights of occupancy, or, if more extensive, extensive in this particular direction—that is to say, that they are transferable.

THIS suit was brought to recover possession of 14 beegahs 10 cottas and 7 dhurs of land alleged to have been the hereditary jote (*jote kadimi mourasi*) of one Botul Roy, who sold it to the plaintiff. In the plaint the lands were described as the gora jote of Botul Roy, paying rent at Re. 1-12 per beegah. The plaint does not state when the sale to the plaintiff took place, but it appears from the deed of sale that it was on 1st October 1874. The plaintiff, it seems, was dispossessed, if, he obtained possession, immediately afterwards, the dispossession not being within one year from the commencement of the suit which was in March 1876, so that the suit could not lie under the summary provisions of Act VIII (B.C.) of 1869, and consequently the plaintiff had to make out that he had a right to possession of the land.

The defendant who wholly denied that the plaintiff had a gora right, among other pleas, alleged that the original tenant had relinquished possession, but that he had no right to transfer his tenure.

Both the lower Courts gave judgment in favour of the plaintiff In the lower Appellate Court the Judge says:—

"It is admitted by the appellant that Botul and his fam obtained a decree in 1850 which fixed the rent of the holi

then 43 beegahs in extent, at Rs. 76-3-2, and this land is a portion of that 43 beegahs. It is also admitted that in 1874, when an attempt was made to increase the rent, the old rent was confirmed." It was urged, however, that Botul Roy did not state that he had paid at an unvarying rate from the time of the permanent settlement, but that the Judge considered to be immaterial, thinking that the holding was one protected from enhancement by sections 3 and 4 of Act VIII (B.C.) of 1869. On appeal the Division Bench of the High Court, before whom the case came, was of opinion that this finding was irrelevant, no question of enhancement having arisen, and that the Judge ought to have found what the nature of the plaintiff's tenure actually was.

The case was accordingly remanded by the High Court in order that the Judge might find—firstly, what the precise character of the vendor's holding had been; secondly, whether by law or established custom that holding could be transferred by sale.

On remand further evidence was taken. Upon that evidence the Judge says: "The precise period at which the holding commenced is not proved. It has been argued that the statement by Botul and his brothers in the proceedings, taken in 1850 as to his ancestors having been "maliks," indicates that the holding commenced after the permanent settlement, as there were no "maliks" till they were created by that settlement. But bearing in mind the date at which those proceedings took place, I think it a fairer inference that all Botul and his brothers meant to say was, that their ancestors had been in a position corresponding to that of the persons then known as 'maliks.'"

The Judge does not seem to have come to any definite finding as to the first point. With reference to the further question he says: "The witnesses also speak of the custom as having arisen within the last five to ten years; and two of them being maliks, the transfer may be held to have been with their consent. I do not, therefore, think the evidence is sufficient to show that at the time of plaintiff's purchase there was an established custom under which, standing alone, plaintiff could claim a decree in opposition to the landlord's wishes. There remains the question as to the law. Had Botul been merely a ryot with a right of occupancy resulting from the operation of section 6, Act VIII

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(B. C.) of 1869, or Act X of 1859, he could not, under the Full Bench Ruling, reported in 18 B. L. R., 274, and 22 W. R., 25, have made a valid transfer of his right without his landlord's permission. But his rights were more extensive.

Argument.

My attention has been called to the case of Bootee Singh, reported in 13 B. L. R., 284, (20 W. R., 478) in which, on an appeal from this district, Mr. Justice PHEAR remarked, 'all the transfers to which he refers are, in terms, transfers of a gorabundi right, therefore the subject which was transferred by them was something very different from the bare occupancy right to this land.'

Botul had inherited his holding, and has continued in possession for such a length of time as would have entitled him under the law to claim a pottah at a fixed rate of rent. No doubt this is a right in derogation and limitation of the rights of the zemindar as proprietor of the soil, but it is a right with which, when once acquired, the zemindar cannot interfere. In the case of a ryot with a mere right of occupancy, the zemindar can, on certain conditions arising, enhance the rent. It is not so where the rent is finally fixed. Botul having acquired valuable and well-defined rights, I can find no reason sufficiently strong for refusing to allow him to sell those rights."

Woodroffe, (Baboo *Rajendro Nath Bose* with him), for the Appellant.

Evans, (Baboo *Mohinee Mohun Roy* with him), for the Respondent.

Woodroffe.—The Judge has not found the precise character of the plaintiff's vendor's holding. He speaks of that vendor's rights as being well defined, but he nowhere defines them. He does not find when the holding commenced, but it would seem from the statement made by the plaintiff's vendor in 1850, that the holding commenced after the permanent settlement. There is consequently no ground for applying the presumption prescribed in sections 3 and 4 of Act VIII (B.C.) 1869.

[JACKSON, *J.* :—Has any proceeding been taken to determine whether the rent of the holding can be enhanced?]

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MOHUNT CHUTTERBHUJ BHARTI v. JANKI PROSAD SINGH.

Argument.

No. That point has not yet been determined. Taking the findings of the Court at the highest, this so-called *gorabundi* tenure is a ryotty holding of a hereditary character independent of any rights created by the Rent Law. The finding that the rent has not been raised for 20 years is irrelevant to these proceedings.

The lower Court has found that there was no established custom under which a transfer of such a holding can be effected without the zemindar's consent. This is sufficient to dispose of the case.

The holding being a ryotty holding, whether hereditary or not, must be taken, in the absence of proof of custom to the contrary, to be non-transferable.

This was beyond all question the state of the law before the introduction of Act X of 1859—*Baboo Prosonokoomar Tagore* vs. *Ram Mohun Dass*, S. D. A., 1855, p. 14. Then does that Act render tenures transferable which could not previously be transferred? That proposition cannot be made out—*Narendra Narayan Roy* vs. *Ishan Chandra Sen*, 13 B. L. R., 275. It may be that, having regard to the provisions of the Rent Law, the rent of this holding cannot be enhanced, but it does not follow that it can be transferred. Moreover, the fact that the holding has descended from father to son is quite consistent with the position of its being merely an occupancy right. See section 6, Act VIII (B.C.) of 1869.

The case reported in 20 W. R., 478—*Bootee Singh* vs. *Moorut Singh*, does not in fact decide anything as to the alleged transferability of *gora* holdings.

Evans.—*Gorabundi* tenures have been made the subject of frequent decisions. The case before PHEAR, *J.*, in 20 W. R., 478, and *Bootee Singh* vs. *Moorut Singh*, 17 W. R., 306, show this.

[JACKSON, *J.*:—These cases do not decide what a *gorabundi* tenure is.]

Evans.—Being a right of property of a hereditary character, it must be taken to be transferable—*Watson* vs. *Joggeshar Attah*, Marsh., 330.

[JACKSON, *J.*:—That case turned upon the express language of the tenure. Consideration is usually paid for such izarahs.

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There is nothing of the sort here; it is merely a tenure or holding.]

Evans.—The case of jungleburi tenures furnishes an illustration of the principle I contend for. They are undoubtedly hereditary and transferable.

[JACKSON, *J.* :—In such tenures the holder, although not paying money for the extended rights secured to him, gives his labour and lays out larger sums in reclaiming the waste land leased to him. It is not reasonable that he should have power to transfer. Is there anything to show that by the expression *gorabundi* anything more is meant than an indication of the *locus in quo* of the lands?]

Evans.—The Judge says that the dictionary meaning is "land near a village homestead," but adds that he is of opinion that a further idea of prolonged holding is attached to it. Such prolonged and heritable rights may be inferred from the fact that the lands have in fact descended from father to son—*Nubo Doorga Dossia* vs. *Durarka Nath Roy*, 24 W. R., 301.

The judgment of the Court (1), which was as follows, was delivered by

JACKSON, *J.* JACKSON, *J.* :—

The case before us forms no exception to the general rule that the plaintiff must prove his case. What he claimed in the present suit was to be entitled to possession of 14 beegahs 10 cottas of land admittedly within the estate of the defendant, upon the ground that he had purchased them from one Botul Singh, who professed to have conveyed to him something called his hereditary *goda* jote. In other places the tenure was called *gorabundi*.

This case having come before us on a former occasion, we remanded it to the Court below in order that two things might be found: firstly, what the precise character of the holding had been; and, secondly, whether that holding could be transferred? As to the first of these questions, the Officiating Judge has had, it is but fair to say, considerable difficulty. No one appears to have been able to satisfy him as to what the precise attributes of

(1) JACKSON and MCDONELL, *J.J.*

a *goda* or *gorabundi* tenure were. It is found that the holding was one of the nature of a right of occupancy, and that it was heritable, and this irrespective of a portion of section 6 of the Rent Law. Beyond these facts, and the fact that it is called a *gorabundi*, the Judge is not able to define what the holding was. It is not even certain, as far as we can discover, that the holding was not liable to enhancement, because that appears to depend upon the effect to be given to a statement made by Botul and his brothers in certain proceedings in 1850 as to their ancestors having been "maliks." The Judge has not made up his mind as to what meaning is to be attached to that statement, but the inclination of his mind is, that the "maliks" in question meant persons in a position corresponding to what were then and afterwards known as "maliks." He has not found whether this holding commenced before or since the time of the permanent settlement. Having thus imperfectly found upon the first question, the Judge proceeds to consider whether such holding is by law transferable by sale. Of course, if there had been any distinct provision of law by which such tenures were made transferable, we should have so held ourselves and required the Court below to do so. All that the Judge had to find was, whether there was evidence of custom by which such tenures could be transferred, and it is clear there was no such evidence forthcoming. The instances referred to by the Judge do not amount to a custom, and certainly no argument could be founded upon them, as the Judge himself says: "Had Botul been merely a ryot with a right of occupancy resulting from the operation of section 6, Act VIII of 1869, or Act X of 1859, he could not, under the Full Bench Ruling reported in 13 B. L. R., 275, and in 22 W. R., 22, have made a valid transfer of his right without his landlord's permission." But the Judge goes on to say, "his rights were more extensive;" he does not say in what way. He refers to an observation of Mr. Justice PHEAR in 13 B. L. Reports, where he says: "All the transfers to which he refers are in terms of transfers of a *gorabundi* right, therefore the subject which was transferred by them was something very different from the bare occupancy right to this land." This remark really means nothing more than this,—Mr. Justice PHEAR, having before him the question whether a right of occu-

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pancy was transferable, and being pressed with instances of the transferability of *gorabundi* rights, says, that did not show that rights of occupancy were transferable. There are no decided cases, nor is there any evidence to show either that *gorabundi* rights are more extensive than rights of occupancy, or, if more extensive, extensive in this particular direction, that is to say, that they are transferable. In this state of things, the onus being entirely upon the plaintiff, we think he has not made out any case on which the Court could compel the zemindar to put him in possession of the land which he professed to have purchased. We think, therefore, the judgment of the lower Appellate Court must be reversed, and this appeal allowed with costs, including the costs of the remand.

[CRIMINAL REFERENCE.]

EMPRESS 1879
May 14th.

AND

CHUNDER NAUTH DUTT . . . . . .

Presidency Magistrates' Act, IV of 1877, section 87, explanation 2—"Revival of a prosecution."

The revival of a prosecution, as mentioned in explanation 2 to section 87 of Act IV of 1877 (The Presidency Magistrates' Act), is not a continuation of the original prosecution, and upon such revival all the witnesses on whose evidence the prosecution intends to rely, as justifying the committal of the accused, must be examined before the Magistrate, and such of them as have been examined at the time of the original prosecution must be examined *de novo*.

REFERENCE to the High Court under section 240 of the Presidency Magistrates' Act.

The terms of the Reference were as follows :—

The defendant in this case surrendered on the 30th July 1878, to a warrant issued by this Court for his arrest on the 26th July 1878, on a charge of stealing and fraudulently appropriating two unregistered letters containing currency notes and a hoondee. He was arraigned before me on the 30th July 1878. The prosecution cited certain witnesses whose evidence was recorded for the commitment of the case to the Sessions, but in spite of a warrant which was obtained under section 135 of the Presidency Magistrates' Act, they failed to produce the material witness whose testimony it was stated would clench the fact of theft. In the absence, therefore, of any evidence to connect the accused with the offence, and after every possible opportunity had been given to the prosecution to produce the absent witness, he was discharged on the 14th September 1878, under section [illegible] of Act IV of 1877. On the 8th April 1879, this witness, Gopaul [illegible]under Ghose, was apprehended. Upon a statement made by him, an application was made by the officiating Government prosecutor to revive the charge against the defendant, Chunder Nauth Dutt, and a fresh warrant was applied for and obtained. The defendant was accordingly placed before this Court on the 29th April 1879, when the evidence of Gopaul [illegible]der Ghose was recorded in his presence. The Government prosecutor does not propose now to examine any further witnesses, and applies that the case might be committed to the Sessions upon the evidence taken on previous occasions before the defendant was discharged, *plus* the evi-

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dence taken after his re-arrest. He contends that the word "reviva explanation 2, section 87, of Act IV of 1877, implies that a proce against an accused, discharged under this section, may be revived at time, and the point where it was left off should form the starting for the proceeding, which might be instituted in the second instanc do not, however, agree with this view. I think when a prisoner is charged for want of evidence, the former proceeding is at an end, when a prosecution is revived, it is a fresh proceeding requiring the dence to be gone into *de novo*. I hardly think the Legislature could meant that a discharge under section 87 should be a remand *sine* Arguments have been drawn from the use of the word "revival," but t arguments appear to me to be fallacious. If the words have been "re of *the* prosecution" instead of "revival of *a* prosecution," there m have been some force in the contention. I take it that the explanati section 87 simply debars the defendant in certain cases to take the of *autre fois acquit*, but creates no especial procedure, such as is conte for. For the reasons above stated I am inclined to hold that no com ment can be made, and that as the Government prosecutor does not pose to call witnesses to prove the material facts of the case, and so e the defendant to cross-examine them with reference to the new evid the prosecution must fail.

As the point, however, is of considerable importance, I solicit the nion of the Hon'ble High Court on the point, which I beg to state sh in the following terms :—

Whether a prosecution revived under explanation 2 to section 87 of IV of 1877 is a continuation of the old proceeding, and whether the dence after the "revival" should or should not be taken *de novo?*

Pending the opinion of the Hon'ble High Court on this reference, I enlarged the defendant on bail to appear on the 20th instant.

The following judgments upon the reference were delive by the Court (1) :—

WHITE, *J.* WHITE, *J.* :—

The question raised by the reference of the Officiating Cl Magistrate is as to the procedure to be adopted in cases un Chapter 8 of the Presidency Magistrates' Act, when an accu person who has been discharged by the Magistrate un section 87 of that Act, because there are no sufficient grou for committing the prisoner to take his trial, is at some sul quent time again prosecuted before the Magistrates for the s offence.

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WHITE, J.

The Act in section 82 states specifically the procedure to be applied when an accused person is brought before the Magistrate, under Chapter 8, and no distinction is made between the cases of a first and that of a second prosecution for the same offence.

The argument that in a second prosecution the witnesses who were examined on the first prosecution, need not be examined again, but may be considered as giving evidence in support of the second prosecution, is based solely and entirely upon the circumstance that the Legislature in explanation 2 of section 87 has described the second prosecution as "the revival of a prosecution."

I think the argument is not sound, and has no sufficient foundation.

The argument is, in fact, an inference from the use of the word "revival."

The object of explanation 2, section 87, is to negative the supposition that a discharge would be a bar to a second prosecution for the same offence. The explanation does not deal with the procedure which is to be adopted, if such second prosecution should take place. The fact that the Legislature has described the second prosecution as "the revival of a prosecution," does not, in my opinion, warrant the inference either that the evidence, upon which the first prosecution is based, is also revived, or that the procedure upon the second prosecution is to be different from that pointed out in section 82.

A further reason for this view is to be found in provision for adjournments which is contained in the same chapter of the Act. Under section 86 a Magistrate has large powers of adjourning an enquiry for reasonable cause, but no adjournment can be for longer than fifteen days at a time.

If, upon a second prosecution, after a discharge, the Magistrate is to treat the evidence that was given in the first prosecution as evidence upon the second prosecution, or as it is called in the reference before us, "taken up the case for the prosecution where it left off when the prisoner was discharged," the Magistrate would in effect be acting as if he had adjourned the enquiry for fifteen days, which he has no power to do.

It cannot be supposed that the Legislature intended by the use of the words "revival of a prosecution" in explanation

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2, section 87, to give the Magistrate such a power after it carefully made provision by section 82 against unlimited adjo ments.

In my opinion, the proper reply to the question of th ciating Chief Magistrate is that a revival of a prosecuti mentioned in explanation 2 of section 87, is not a conti of the original prosecution, from which the accused discharged, and that upon the revival of the prosecutio witnesses on whose evidence the prosecution intends justifying the committal of the accused, must be exami the Magistrate, and, if any of them were examined of the original prosecution, they must be examined *de*

MORRIS, J. MORRIS, J.:—

I concur.

[FULL BENCH.]

GOPI MOHUN MOULIK . . (PLAINTIFF) APPELLANT;

AND

TARAMONI CHOWDHRANI (DEFENDANT) RESPONDENT.

1879
April 17*th*.

No. 59 of 1877.

Nuisance—Criminal Procedure Code, Act X of 1872, *section* 518—*Power of Magistrate—Rival Hauts.*

A Magistrate has no power, under section 518 of Act X of 1872, to make an order prohibiting one of two rival proprietors of two different hauts, from holding for the future his haut on Tuesdays and Fridays, such an order being in the nature of a perpetual injunction and entirely beyond his jurisdiction.

Where the plaintiff, after stating in his plaint that for many years he had held a haut on his own lands on Tuesdays and Fridays, alleged that the defendant had set up a rival haut on the same days and endeavoured to prevent people attending his haut, thereby creating a disturbance which led to the Magistrate passing an order under section 518 of Act X of 1872, prohibiting him (the plaintiff) for the future holding his haut on these days: *Held*, that assuming the facts to be true, the plaintiff was entitled to a decree declaring that as against the defendant he had a right to hold his haut on Tuesdays and Fridays.

REGULAR APPEAL from a decision of the Subordinate Judge of Mymensingh.

The appeal came on for hearing before Mr. Justice MITTER and Mr. Justice MACLEAN, who referred the case to a Full Bench in the following terms:—

The plaintiff alleges that he is the owner of a shikmi taluq, consisting of Mouzahs Nalitabari, &c.; that within Mouzah Nalitabari there was a haut from the year 1190, which used to be held on Tuesdays and Fridays; that a new haut called Tarajung was established by the defendant in a neighbouring place, within the zemindari of the latter, who attempted, by illegal means, to prevent people from making their market in his haut; that disturbance having arisen in consequence of defendant's illegal acts, the Deputy Magistrate of Jamalpur, by an illegal and unjust

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order, dated the 31st May, 1875, has prohibited the plaintiff, under section 518, of Act X of 1872, to hold the Nalitabari haut on the days it used to be assembled; that in consequence of this order the plaintiff's haut has been closed, and he thereby sustained a heavy loss; that of the two hauts, the plaintiff's haut is far more ancient, and had been held from the year 1190, on Tuesdays and Fridays, till closed by the aforesaid Magistrate's order; that "in accordance with justice and equity," he is entitled to assemble the haut on his own land in Nalitabari on the aforesaid days; that this suit has been brought to set aside the unjust order of the Magistrate, and to declare the plaintiff's right to hold his haut on Tuesdays and Fridays. The defendant, in her written statement, states (1) that a civil suit, to set aside a Magistrate's order passed with jurisdiction, will not lie; (2) that the plaint discloses no cause of action against her, and that upon the plaint, the plaintiff is not entitled to a decree; (3) that the plaintiff's haut not having been assembled within the last twelve years, the suit is barred by limitation; and (4) that there was no haut at Nalitabari, but that the plaintiff, having established a new haut, attempted to make it flourish by various acts of oppression on *hautawaris*, whereupon the Magistrate, after a judicial finding that the plaintiff's servants were to blame for these acts, has passed the order complained of.

The lower Court has dismissed the suit, and the plaintiff has preferred this appeal. It has been urged before us, in appeal on behalf of the defendant, respondent, that the plaintiff cannot succeed, even if all the facts stated in his plaint be established; that no cause of action against the defendant has been disclosed in the plaint; and that the Civil Court has no power to set aside an order passed by a Magistrate with jurisdiction under section 518 of Act X of 1872.

Another case is also before us in which the same points are involved, and as the questions raised are not free from difficulties and doubts, and civil cases of this nature are likely to be more frequent in consequence of very large powers being vested in Magistrates under section 518 of Act X of 1872, we think it desirable that there should be an authoritative decision by a Full Bench upon these points. The questions referred are—

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First.—Whether the plaintiff is entitled to a decree, and (if entitled) to what decree upon the facts stated in the plaint?

Second.—Is there any cause of action disclosed against the defendant?

Third.—Upon the facts stated in the plaint, could the plaintiff claim any damages or seek any other consequential relief against the defendant?

Fourth.—Whether the Civil Courts can set aside an order passed with jurisdiction by a Magistrate, under the section 518 of Act X of 1872?

Fifth.—Whether the Magistrate was competent to pass the order complained of in this case under the provisions of section 518 of Act X of 1872?

We are aware that there are two Full Bench decisions more or less bearing upon the last question. But one of these was passed with reference to the construction of section 62 of the old Procedure Code; and in our opinion the explanation of section 518 of Act X of 1872, has made a material alteration in the provisions of section 62 of the Old Procedure Code. In the other case, the question raised was whether the Court, under the provisions of section 15 of 24 and 25 Victoria, Chapter 104, has power to interfere with an order passed by a Magistrate under section 518 of Act X of 1872.

Woodroffe, (Baboo *Kali Mohun Dass*, Baboo *Bhuban Mohun Does*, and Baboo *Jogesh Chunder Roy*, with him) for the Appellant.

Evans, (Baboo *Sreenath Doss* and Baboo *Kishen Doyal Roy*, with him) for the Respondent.

Woodroffe, for the Appellant.

The cases now dealt with, under section 518 of Act X of 1872, were formerly dealt with under section 62 of Act XXV of 1861. These two sections are the same up to the word "affray" in the section in the later Act.

Section 521 (referred to in 518) of the Act of 1872, substantially treats the same class of cases as section 308 of the old Code. We find section 518 in the new Code, and section 308 of the old, both under the head entitled "Of Local Nuisances."

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Now it seems plain upon the wording of section 518 of the present Code, and having regard to the Chapter in which it is inserted, and to the explanations appended thereto, that a Magistrate is not empowered to pass an order under section 518, save in cases where a speedy remedy is desirable, and where the delay occasioned by a resort to section 521 and following sections would occasion greater evil, or would defeat the intention of the Chapter.

It is not stated in the Magistrate's order, which we are now considering, that there were any circumstance requiring urgency.

In the case of *Banee Madhub Ghose* vs. *Wooma Nath Roy Chowdhry*, 21 W. R., Cr., 26, it was held that the operation of section 518 is confined to cases, where, in the opinion of the Magistrate, the delay which would be caused by adopting a different procedure from that specified in the explanation to the section would occasion a greater evil than that suffered by the person on whom the order was made, or would defeat the intention of the Chapter, and there, an order of a Magistrate, under section 518, was set aside as being *ultra vires*, being based upon a police report, which was vague and insufficient to show proper ground for an order under that section.

[GARTH, *C.J.*—This appears to have been a case under section 15 of the Charter Act, and the order was set aside on the ground that it was made without jurisdiction.]

Again, the order of a Magistrate passed under section 518 was set aside by KEMP and GLOVER, *J.J.*, in the case of *In re Bindabun Dutt*, as being illegal. Their lordships say: "This is clearly a case for an order under section 521, and we therefore quash the order." It does not appear whether that order came up under section 15 of the Charter Act.

[GARTH, *C.J.*—The order must have come up under the Charter Act, for there could be no reference or appeal from an order under section 518, an order under that section not being a judicial proceeding.]

I raised that objection in the case of *In re Bykuntram Shaha Roy*, 10 B. L. R., 434, that, the order there under section 518 not being a judicial proceeding, there could neither be a reference nor an appeal to the High Court.

In the case of *Sreenath Dutt* vs. *Unnoda Churn Dutt*, 23 W. R., Cr., 24, it was held that the circumstances of the case did not warrant an order under section 518.

An application was made before MARKBY and MITTER, *J.J.*, in *In re Krishna Mohun Bysack*, 1 C. L. R., 58, to set aside the order of a Magistrate passed under section 518. That was a case where it did not appear that any delay which would be occasioned by a resort to less summary proceedings would occasion any serious evil whatever. Their lordships quashed the order as illegal, being of opinion that the order was not one falling within the provisions of section 518, and therefore subject to section 520, but came within the definition of a judicial proceeding as given in section 4, and was therefore subject to the same revision as any other judicial proceeding of a Magistrate. See also *Chunder Coomar Roy*, petitioner, 27 W. R., Cr., 78, quoted in last case.

[GARTH, *C.J.*—We are all agreed that the circumstances of emergency must be such as to justify the Magistrate in making an order under section 518, and that if they are not, the order may be set aside as made without jurisdiction. The questions you have to consider are first, whether the circumstances are such as to give the Magistrate jurisdiction; secondly, if they were, had he power to make an order tying up the rights of all parties for all time.]

I submit, on the authority of the cases cited, that having regard to the terms of section 518 and the terms of the order passed, the Magistrate was not competent to pass the order complained of under section 518. But I go further and say that, even if circumstances had existed which would have justified the Magistrate in passing the order under section 518, and even if those circumstances had been set forth in the order, the Legislature did not contemplate the passing of an order which in fact amounted to a perpetual injunction preventing a man exercising his civil rights. I am not aware of any authority in support of the contrary proposition.

I now come to the question as to the Magistrate's power to make this order. The use of the word "prevent" in section 518 points to the time when the action of the Magistrate is to be invoked. So far as the case of *Bykuntram Shaha Roy*, 10 B. L. R., goes, there is nothing against my argument. The question

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Argument.

in that case really amounted to this:—Can a Magistrate, in a case, which comes within section 62 of the old Code, for public reasons, prohibit a man from holding a haut at a particular place and time, and the answer was that circumstance may exist which would make a temporary interference lawful. The Judges there do not support the proposition that a perpetual order of this kind could have been made.

The case of *Shib Chunder Bhuttacharjee* vs. *Saadut Ali Khan*, 4 W. R., Cr., 12, shows that a Magistrate has no power to interfere with private rights, and that a landlord may set up a haut if he pleases, although in *Reg.* vs. *Kali Prosad*, 5 B. L. R., Appendix 82, where there were two rival hauts on adjacent pieces of land, the parties were prohibited from holding them on the same day.

It is laid down in *Huri Mohan Malo's* case, 1 B. L. R., A. Cr., 20, that under sections 62 and 308, the Magistrate must make a clear statement in the order itself of the circumstances under which he makes the order.

In the Full Bench case, *Reg.* vs. *Abbas Ali Chowdhry*, 6 B. L. R., 74, which succeeded these cases, the question was, whether an order made under section 62 was a judicial proceeding or not, and as such liable to revision. PHEAR, *J.*, who dissented from the judgment of the Full Bench, considered that the power conferred by section 62 was of a judicial character, within the meaning of the word "judicial" in section 404, and that an order of a Magistrate in exercise of that power was in the nature of an injunction, and therefore subject to revision by the High Court, under section 404 of the Criminal Procedure Code.

There is a class of cases which show that Magistrates have no power to make orders which are in their nature in deprivation of the right of private property. In *Reg* vs. *Ram Chunder Mookerjee*, 5 B. L. R., A. Cr., 131, where a Magistrate, being of opinion that certain bamboos were too thick and close to another man's property, under section 62 of Act XXV of 1861, ordered them to be cut down as being a nuisance and injurious to health, it was held that the Magistrate had no power to make the order. See *Reg.* vs. *Sheikh Golam Darbesh*, 1 B. L. R., Short Notes, 27. The case of *Arzanoolah* vs. *Nazir Mullick*, 21 W. R., Cr., 2[illegible] where a Magistrate made an order prohibiting the re-opening of

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a haut, is very similar to the case in point. In *Tarucknath Mookerjee* vs. *Collector of Hooghly*, 13 W. R., Civ. R., 13, where an action was brought against the Collector in consequence of an order as to the cutting of a bund, it was laid down that the Government had no right summarily to destroy private property merely because it considered that doing so would be for the public convenience.

So in the case of *Puneah Singh* vs. *Jogessur Sahaye*, 8 W. R., 112, where a Magistrate, professing to act under section 62 of Act XXV of 1861, made an order that a bund should be cut, a suit was brought by the plaintiff, against whom the order was made, for a declaration of his right to have the bund closed, and for damages against the persons who had set the law in motion; the High Court ordered that the bund should be closed, though the claim as to damages was dismissed.

That an order can be set aside in this way is stated also in the notes upon section 518 of Act X of 1872 by Mr. PRINSEP, who quotes the case of *Sidgopal*, 5 Agra, 108.

In *Thakoor Sing* vs. *Sheo Pershad Ojhar*, 5 All. R., 8, the order directed the parties to abstain from holding a market on particular days, with leave to any person aggrieved thereby to bring a civil suit.

[Mr. *Woodroffe* was here stopped by the Court.]

Evans, for the Respondents:

I shall first contend that the Magistrate had a right to make this order, and that under the circumstances the question is not now triable here, but that if it is, it cannot be tried between the plaintiff and any other individual, but between the plaintiff and the Crown.

Since the decision of *Jugnarain Dutt* vs. *Hurri Churn Deb*, S. D. A., 1853, p. 275, it has been held law in this country that all zemindars, as between themselves, have a right to hold hauts.

[GARTH, *C.J.*—In your written statement you state that the plaintiff has no right to hold a haut by reason of the order of the ate. You can't say as against you he has a right to have er set aside.]

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I contend that the plaintiff has no right in any civil proceeding whatever to have this order set aside. Under any circumstance this is not the tribunal to set aside the Magistrate's order. If there was jurisdiction to pass the order, it cannot be set aside.

[WHITE, *J.*—But suppose the Magistrate had no jurisdiction to make the order, isn't it a nullity?]

It is.

[WHITE, *J.*—Then if it is a nullity, may not the plaintiff sue to establish his rights?]

It has been decided that a man cannot acquire a prescriptive right to the custom of market. I put this forward to show that there is no right of property interfered with at all, for Mr. Woodroffe has been arguing upon the alleged deprivation of right of private property. The order complained of is an order altering the day of the haut. Regulation XXVII of 1793, which provides for the tolls, &c., derivable from hauts, declares the position of hauts in this country. There is no common law right to hold a market in India any more than there is in England. The right to take tolls was taken away from all subjects by the Government, but at the same time this Regulation provides that zemindars shall still have the right to charge rent for shops, &c., in the hauts upon their lands.

It is for the preservation of peace and quiet that no right of market is allowed in England, except under grants from the Crown.

Now all that the Magistrate has done here is to say that the plaintiff must not assemble people on certain days in the week; he does not prohibit the holding of his haut; no right of property is interfered with.

It must follow, as in England, that the right to assemble people together ought to be subject to the ruling power. We find from the cases that, as a matter of fact, hauts in this country have been constantly regulated by the Magistrate. It is not necessary for me to go so far as to say that these hauts are illegal. I only say there is no common law right to hold a haut, and that the ruling power has, and ought to have, a right to interfere for the preservation of the peace, by prohibiting, if necessary, the assembling of the people. Assembling a haut is not a right or incident of property, and never was.

[GARTH, *C.J.*—If holding a haut is not illegal, has not the plaintiff a right to hold his haut?]

Yes, if there is no order of the Magistrate prohibiting it. The power given under section 518 is general, and under it the Magistrate may interfere to stop all disturbances, whether in respect of a haut or not.

I now come to consider the order itself. The first question is whether the Magistrate had jurisdiction.

That he had jurisdiction to prevent the holding of the haut for a limited period at all events is clear from the case of *Bykantram Sikha Roy*, 10 B. L. R., 434, *S. C.*, 18 W. R., 47.

Is the Magistrate, who fears an affray will take place on Tuesday, to limit the order to that day when he apprehends perhaps that an affray is equally likely to take place on the Friday following?

It would appear that so long as the Magistrate exercises his discretion in preventing future disturbance, the power to act, as he has done, is a salutary if not a legal power. A Civil Court cannot prohibit a rival haut, however close—*Jugnarain Dutt* vs. *Hurri Churn Deb*, S. D. A., 1857, p. 275, and as it was necessary for some one to take the matter in hand, the only person who could do so was the Magistrate.

Section 521 refers only to a small class of cases comprised by section 518, and makes no reference to a riot or affray, so the Magistrate could not have acted in this particular case under that section.

Where a Magistrate having jurisdiction has passed an order, after satisfying himself of the necessity for the order, the Civil Courts have no power to question his discretion—*Kedar Nath* vs. *Bugho Nath*, 8 N. W. P., 104. In such a case the proper course for a party aggrieved to adopt would be to ask the Magistrate to reconsider his order. If he refused to reconsider the order the only remedy would be by suit against the Magistrate.

[GARTH, *C.J.*—We have already held that proceedings cannot be taken against a Magistrate who has acted *bonâ fide* under a particular provision of the law.]

That is in the case of a judicial proceeding, but the order under consideration is not a judicial proceeding. *Reg.* vs. *Abbas Ali Ghowdhry*, 6 B. L. R., F. B., 74.

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[GARTH, *C.J.*—The question there was whether the order was so far judicial as to be subject to revision, and therefore coming within the Statute Act XVIII of 1850, which protects Magistrates in the performance of their duty.]

That question was fully discussed in the case of *Chunder Narain Singh* vs. *Brijo Bullub Gooyee*, 14 B. L. R., 254, where it was held that the removal of an obstruction by a Magistrate in the exercise of powers conferred upon him by Act VI (B. C.) of 1868, was not a judicial proceeding, and that therefore the Magistrate making the order was not protected by Act XVIII of 1850 from suit at the instance of the person against whom the order was directed.

In *Ujalamayi Dasi* vs. *Chandra Kumar Neogi*, 4 B. L. R., F. B., 24, it was laid down that a suit would not lie in a Civil Court to set aside an order, as to a nuisance, duly made under section 308 of Act XXV of 1861, or to restrain the Magistrate from carrying his order into effect.

So it was held in the case of *In re Chunder Nath Sen*, I. L. R., 2 Cal., 293, that the High Court could not interfere, under section 15 of the Charter, with orders duly passed by Magistrates under section 518.

There is some difficulty as to the jurisdiction, but on the authority of the case of *Bykantram Shaha Roy* already cited, the Magistrate would have power to stop the market by an order under section 518.

[GARTH, *C.J.*—But would the Magistrate be justified in making an order to extend indefinitely into the future?]

The order ought not to be bad because issued without restriction as to time; a temporary order has been held to be good. In *Reg.* vs. *Kaliprasad*, 5 B. L. R., Ap., 82, note, a Magistrate was held to have power under section 62 of the old Code to make an order of this kind.

[JACKSON, *J.*—In that case we raised the question whether the Magistrate had power to restrain a person from exercising his undoubted rights.

[GARTH, *C.J.*—Is there any authority to show that this order is good so far, though not good to the extent of directing that the haut shall never again be held.] There is the case reported in *Kedar Nath* vs. *Rugho Nath*, 6 N. W. P., 104.

[GARTH, *C.J.*—The present order appears to be indivisible, it is simply an order restraining the plaintiff holding his haut again.]

I admit that there is no limit of time expressed in the order: but in such a case as this, it would be difficult to fix a time for the duration of the order. No doubt if the order is to be looked at strictly according to the rules of English Law, the order may be said to be bad.

[AINSLIE, *J.*—For the Magistrate to have passed an order in the nature of a perpetual prohibition under section 518 he must have been able to certify the existence of an emergency for ever.]

[JACKSON, *J.*—Suppose the order had been directing the plaintiff not to hold his haut any Tuesdays or Fridays, except next Tuesday and Friday, could that order have been good?]

In that case there would have been no emergency, and the order would have been bad in the face of it. Here the Magistrate makes the order general as to Tuesdays and Fridays, and this may be taken with the explanation to the section to be intended to remain in force only until further order. The proper course would be to ask the Magistrate to specify for what time the order should ensure.

The next question to be considered is, whether the plaint discloses a cause of action. I am not prepared to admit that the plaintiff is entitled to a declaration of his right to hold his haut. Had the plaint been framed on the allegation that I had caused him loss by preventing people from attending his haut, there would have been a good cause of action disclosed, but it is not so framed; the damage or loss is stated to have arisen from the Magistrate's order, and that damage is too remote.

[WHITE, *J.*—Looking at the plaint it seems clear that the plaintiff is entitled to a declaratory decree (and to an injunction if he had asked for it); the only question seems to be as to his right to have the Magistrate's order set aside].

Not having made the Magistrate a party to the suit he cannot succeed upon that point. I contend that the order cannot be set aside under section 15 of the Charter, or under the Criminal Procedure Code.

Mr. Woodroffe was not called upon to reply.

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GARTH, *C.J.*

The following judgment of the Full Bench(1) was delivered by

GARTH, *C.J.*:—

In answering the questions which have been referred to us by the Division Bench, it will be convenient, in the first place, to dispose of the last and most important of them, viz., whether the Magistrate was competent to pass the order complained of under the provisions of section 518 of Act X of 1872.

The order was in these terms:

"To Gopi Mohun Moulik, inhabitant of Paikpara, Purgunna Shurpur.

"Case—Unlawful Assembly.

"It has appeared at the trial of the said suit, that a haut having been established since 20 or 25 years at Tarajung, the estate of the said Chowdhrani, is duly held every week on Tuesday and Friday. At present, you having set up a new haut at Nalitabari, which is quite close to the said haut, have fixed Tuesdays and Fridays, in other words the days on which the Tarajung haut is held, for holding your newly established Nalitabari haut. Since by reason of the days fixed for holding this newly established rival haut being exactly the days on which the Tarajung haut is held, an occurrence leading to a breach of the peace took place at the said newly established Nalitabari on the 20th of April 1875, corresponding with the 8th of Bysack of the year 1282 B.S. Consequently, unless the days for holding the said Nalitabari haut be altered, there is every likelihood of men's health and peace being affected, and of affrays and breach of the peace taking place in future. Hence you are hereby prohibited from holding the Nalitabari haut on Tuesdays and Fridays in accordance with the provisions of section 518 of the Criminal Procedure Code, and you are ordered to alter the days for holding the said haut. The 31st May 1875."

We may assume, for our present purpose, that the circumstances under which the Magistrate was called upon to interfere were such as to enable him to make an order of some kind under that section.

The question is, whether he had the power, under any circum-

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stances, to make an order prohibiting the plaintiff for ever from holding a hant on every Tuesday and Friday on his own land.

We believe that this is the first occasion on which this point has been seriously considered by a Full Bench of the Court; and as we are aware that Magistrates in this country have been in the habit of making orders of this nature, restraining persons for an indefinite period from the exercise of civil rights over their property, and as this practice has apparently derived some sanction from former Full Bench decisions of this Court, it has been thought advisable in this instance to take the opinion of the whole of the Judges, in order to determine a question, which undoubtedly is of very great importance to the public.

The first of these decisions is the *Reg.* vs. *Abbas Ali Chowdhry*, reported in the 6 B. L. R., 74. The order of the Magistrate in that case was made under section 62 of Act XXV of 1861, and the only question raised was, not whether the order itself was good or bad, but whether the High Court had any power to deal with it as a Court of Revision; and it was held that as the order was not a judicial act, the High Court had no such power. The next of these decisions was in the matter of *Bykuntram Shaha Roy*, 5 B. L. R., 434. The order there also, which was similar in its terms to that which we now are considering, was made under section 62 of the Act of 1861; but the question which was argued and decided there was, whether a Magistrate under that section could prevent a landowner from doing a *lawful* act on his own land; it being contended that he had only a right to prevent acts *which were in themselves unlawful.*

The point which is now before us, namely, the time during which such an order could legally be made, was not raised, or intended to be raised, in that case; for the Chief Justice, in delivering the judgment of the Court, expressly says: "It is not necessary for us to determine the question whether the Magistrate has in this particular case exercised his discretion in a proper manner, or *whether his order, as it stands, requires any amendment as to the duration of the injunction or otherwise,* for these questions have not been referred to us by the Division Bench." And he goes on to say, "that there may be circumstances" which

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would justify a Magistrate in issuing an order under section 62, at least for a limited "time," which shows that the point which we have now to decide was present to the mind of the Court, although they were not called upon to decide it.

The last Full Bench Decision, in which a similar order came under discussion, was in the matter of *Chunder Nath Sen*, I. L. R., 2 Cal., 293. The order there was made under section 518 of the present Code, with which we are now dealing; and the question referred was, whether this Court had jurisdiction to set aside the order, under section 15 of the Charter Act.

It was there contended that, under the circumstances, the Magistrate had no power to make any order at all; and if that were so, that this Court could and should, under section 15, have set aside the order, as being made without jurisdiction.

But the Court decided that the circumstances were such as to give the Magistrate jurisdiction to act, and consequently that they could not interfere.

The point was never raised in that case, though probably it might have been that the terms of the orders itself, as regards its duration, were not warranted by law; and therefore we find ourselves now dealing with a point, which, although mooted on more than one occasion in this Court, and also by the Allahabad High Court, in the case of *Kedar Nath* vs. *Rugho Nath*, 5 N. W. P., H. C., 104, is for the first time directly submitted for our determination.

The provisions of section 62, in the Code of 1861, are substantially the same as those of section 518 of the present Code; but there are certain explanations appended to the latter section which aid us materially in the construction of it.

The first of them relates to the cases to which the section was intended to apply; and shows that it is applicable only where a speedy remedy is called for; and where, for either of the reasons specified, a more formal procedure would be inappropriate. We think it would be inconsistent with this expression of the intentions of the Legislature, that a Magistrate should pass under this section an order meant to have more than a temporary operation; and although such order may no doubt, for what seems to the Magistrate sufficient cause, restrain a man in the otherwise lawful

exercise of his rights, such restraint ought clearly not to be indefinite in its terms, or to have effect beyond the urgency which it was intended to provide for.

Now in this instance, it is clear that the order of the Magistrate would have such effect.

The plaintiff says, in his plaint, that for many years past he has been in the habit of holding a haut on every Tuesday and Friday in his own mouzah; and that as the owner of the adjoining mouzah insisted on holding a rival haut on the same days, disputes arose and violence was threatened, which the Magistrate was called upon to prevent, whereupon he made the order in question, under section 518, prohibiting the plaintiff for the future from holding his haut on Tuesdays and Fridays.

We consider that the Magistrate had no jurisdiction to make so wide an order, and that the grant of what is in effect a perpetual injunction is entirely beyond his powers. He might have prohibited the holding of the haut on any particular occasion or occasions, but he had no right to deprive the plaintiff for ever of a right to which he was by law entitled.

The last question, therefore, is answered in the negative; and we now proceed to deal with the questions 1, 2, and 3, which may conveniently be answered together.

The plaint, after alleging that the plaintiff had held his haut on his own land for many years, on Tuesdays and Fridays, alleges that the defendant set up a rival haut, and endeavoured to prevent persons from attending the plaintiff's haut. That this led to disturbances, which ended in the Order being made by the Magistrate, prohibiting the plaintiff from holding his haut on the above days, and that the plaintiff has suffered loss and damages in consequence.

We think that, assuming these facts to be true, the plaintiff is entitled to a decree declaring that, as against the defendant, he has a right to hold his haut on Tuesdays and Fridays.

We are agreed that, for the purposes of this case, it is unnecessary to answer the 4th question.

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April 17*th*.

No. 73 of 1879.

[CRIMINAL JURISDICTION.]

MAHARAJAH OF BURDWAN . . . . . PETITIONER;

AND

THE CHAIRMAN OF THE DARJEELING MUNICIPALITY.

Criminal Procedure Code, Act X of 1872, *section* 532—*Dispute, Nature of—Jurisdiction of Magistrate—Declaratory Decree.*

To enable a Magistrate to interfere in any matter under section 532 of the Code of Criminal Procedure (Act X of 1872), there must be some substantial dispute in some way necessitating such interference.

That section only enables the Magistrate to prevent arbitrary interruption, by any person, of rights actually enjoyed by the public or a person or class of persons; it does not enable him to make a purely declaratory decree.

RULE to show cause why an order, passed by the Assistant Commissioner of Darjeeling, under section 532 of the Criminal Procedure Code, should not be set aside.

The order complained of was obtained under the following circumstances:—

There is a road at Darjeeling, it seems, running through the Maharajah of Burdwan's property and joining two public roads. It was stated in the petition, and it appears to be undisputed, that this road had from time to time been repaired, extended and improved by the Maharajah at considerable expense, and that the Darjeeling authorities, when they were applied to in the matter, distinctly declined to repair the road or in any way to make themselves responsible for the expenses of keeping it up. For eleven years there had been gates on the lower end of the road.

There were other roads, admittedly private, running through the Maharajah's property, and upon all of these roads gates had been erected at different times.

In April or March 1878, Major Lewin, who had recently been appointed Deputy Commissioner of Darjeeling, discovered the gates which had been erected on the lower end of the first-mentioned

road, and conjecturing, as he subsequently said in his evidence, that the road was a public road, he brought the matter to the notice of the Municipal Commissioners, he himself being Chairman of that body. On the 4th June, and again on the 15th July, resolutions were passed by the Commissioners to the effect that the Chairman should take the necessary steps for enquiring into the existence of a right of way along this road, and if it should appear that such right of way existed, he should take further steps to enforce it and remove any obstruction. Both of these resolutions were signed by Major Lewin. Meanwhile, the Maharajah had been communicated with, and on the 19th June his Private Secretary wrote a letter to Major Lewin, pointing out that the Maharajah was perfectly willing to allow the public the use of the road during the day, but that he claimed the right to close the gates after dark, and to keep them shut till sunrise; and that as a matter of fact, no one had ever been stopped on any of the Maharajah's roads.

Nothing further seems to have been done until, on the 30th October, a summons was issued to the Maharajah from the Magistrate's Court to appear and answer a claim on behalf of the, public, made under section 532 of the Criminal Procedure Code with respect to the right of way over the road in question.

No notice was given as to the person or persons at whose instance the claim was made until the 7th December, when a letter was written by Major Lewin, as Deputy Commissioner, to the Maharajah, from which it appeared that the Municipal Commissioners were the claimants. In this letter an offer was made on their behalf to withdraw the proceedings in the Criminal Court if the Maharajah would undertake to bring a suit in a Civil Court against the inhabitants of Darjeeling to substantiate his claim to the road in question. This offer was declined. After numerous adjournments the proceedings finally came on for hearing on the 18th January 1879.

The proceedings were made over by Major Lewin for trial and disposal to the Magistrate of Darjeeling, who was also Vice-Chairman of the Municipality, but had not taken any part in the proceedings of that body with reference to this matter.

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No evidence was given to show that any one had been obstructed or prevented from passing along the road. Major Lewin, who was called as a witness, explained that his object in taking these criminal proceedings was to force the Maharajah to bring a civil suit, as that course would cost the Municipality less money. On the part of the Maharajah it was contended that the proceedings were groundless and unnecessary; that there was no dispute within the meaning of section 532, and that the Magistrate therefore had no jurisdiction to pass any order under that section.

The Magistrate, however, held that he had jurisdiction, and in coming to this conclusion he says:—"I come to this conclusion with much diffidence in the face of the strong ruling in *Rosik Lall Nundi* vs. *Kartik Shant*, 22 W. R., Cr. Rul., 48. I am however constrained to fall back on my own humble reasoning."

The order accordingly made by the Magistrate was "that possession of the road be not taken by the Maharajah of Burdwan, to the exclusion of the public, until he shall have obtained the decision of a competent Civil Court, adjudging him to be entitled to such exclusive possession."

A rule was obtained, calling on the Municipal Commissioners to show cause why that order should not be set aside.

Woodroffe and *Sale* (with them Baboo *Bussunt Coomar Bose*) for the Petitioner.

Phillips (with him Baboo *Ram Churn Mitter*) for the Opposite-Party.

Phillips.—There is a substantial dispute between the Maharajah on the one hand, and the public on the other hand. The admission on the part of the Maharajah that the gates were shut at night is a sufficient obstruction to give the Magistrate jurisdiction under section 532 of the Criminal Procedure Code. The dispute described in that section may mean any dispute.

[JACKSON, *J.*—Can you suggest any limit to the action which might be taken by a Magistrate under this section?]

The section is wide. It is sufficient that there has been a claim made and resisted. It is not necessary, as under section 530, that the Magistrate should be apprehensive of a breach of the peace—*Reg.* vs. *Toyluckonath Sircar*, 2 W. R., Cr. Rul., 64;

Chowdhree Zuhoorul Huq vs. *Kurum Chand Singh*, 24 W. R., Cr. Rul. 15; Reference dated 6th August 1870, 14 W. R., Cr. Rul., 28.

[JACKSON, *J.*—These cases show that the Magistrate should not interfere in speculative cases or disputes. The question here is whether there is a dispute or not?]

Phillips.—The putting up the gates upon this road is something more than a mere abstract claim to exercise some right over the road. The question really resolves itself into a technical question of jurisdiction. The Maharajah is in no way injured by the order.

Woodroffe.—There is no dispute within the meaning of section 532. The evidence shows that the Deputy Commissioner thought there might be right of way along the road, and the result was, that these proceedings were brought to enquire into this possible right of way.

It is not necessary probably to argue that a breach of the peace should be imminent to give the Magistrate jurisdiction, though the case of *Rosik Lall Nundi* vs. *Kartik Shant*, 22 W. R., Cr. Rul. 48, seems to go to that length.

Mr. *Woodroffe* was here stopped by the Court. Mr. *Phillips* did not reply.

The judgment of the Court (1), which was as follows, was delivered by

JACKSON, *J.*:— JACKSON, *J.*

This case comes before us upon a petition of the Maharajah of Burdwan. He complains of an order passed by Mr. Abbott, Assistant Commissioner, with powers of a Magistrate, at Darjeeling, under section 532 of the Code of Criminal Procedure. The subject to which this order related was a road which apparently passes over the ground of the Maharajah and is claimed by the Maharajah as being his private road, and is not shown to have been in any sense belonging to, or maintained by, the public, but one over which it may be said the public have a limited right of way.

(1) JACKSON and MCDONELL, *J.J.*

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It seems that Major Lewin, who was the Deputy Commissioner of Darjeeling, in the course of his inspection of the station roads, observed this road with gates or gate-posts at one end of it, and it struck him that the road was or ought to be a public thoroughfare. He, therefore, consulted with the Municipal Commissioners, and the result was that they authorized him to move in the matter and, if necessary, take proceedings to establish the supposed right of way. Thereupon Major Lewin, in his capacity of Deputy Commissioner, instituted proceedings, and referred them for hearing and trial to Mr. Abbott, and Mr. Abbott passed the order which is now complained of, viz., that "possession of the road running along the jhara from the black gates on the Cart Road to the black gates on the Victoria Road, and lying between those gates be not taken by the Maharajah of Burdwan to the exclusion of the public and inhabitants of the Darjeeling Municipality, until he shall have obtained the decision of a competent Civil Court adjoining him to be entitled to exclusive possession."

When this rule was obtained, our attention was called to the fact that the Magistrate, who decided the case, was himself the Vice-Chairman of the Municipality, and some comment was made on the position which he and Major Lewin, occupied being in part that of prosecutor, and in part Judge, in the matter. But we find that, irrespective of the necessity for such plurality of offices which no doubt occasionally arises, and which leads to Magistrates occupying a somewhat anomalous position in such proceedings, there really is no valid objection to Mr. Abbott's deciding this case, because it appears that he took no part in those deliberations of the Municipality out of which these proceedings arose.

But a more serious question remains as to the authority of the Magistrate to make such order, and the propriety of that order.

The terms of section 532 do no doubt differ from those of section 530, in that the dispute from which these proceedings are supposed to spring is not described as a dispute likely to induce a breach of the peace, and the learned Standing Counsel who argued this case with great fairness and ability, for the

Municipality is in a manner forced to contend that the dispute described in section 532 may mean a dispute of any kind, being simply a claim made and denied, or a claim resisted, and he is unable, upon a question put to him, to suggest any limit on which the authority of the Magistrate to enquire into such disputes should stop.

It appears to us that without going so far as to say that the dispute which enables Magistrates to interfere under this section must be a dispute likely to induce a breach of the peace, it must, at any rate, be some substantial dispute necessitating the interference in some way or other of the criminal authorities. It would not be sufficient that there should be a mere discussion or verbal altercation between persons claiming rights of the kind described. There must be an actual dispute.

Now, in this case it is clear there was no dispute between the Maharajah and any person until the head of the Municipality, who was himself the Magistrate, *proprio motu*, and, I may say, in a purely speculative way, took up the question whether there ought or ought not to be a public thoroughfare over this road. The evidence shows that no person had ever been obstructed, no person ever set up any claim to pass over this road otherwise than every one had hitherto been allowed to pass unobstructed over it. The questions which arose in the correspondence between the Magistrate and the Maharajah's Private Secretary related to a right which, so far as the evidence goes, had never been exercised and never, in practice, claimed, viz., that of passing over the road during the hours between sunset and sunrise. Now, this not being a question of public thoroughfare, but a right of way, it is obvious that a right of a limited kind might very well grow up, and I think the owner of the ground, over which such a right of way existed, would be perfectly justified in taking, and would be wise to take, precautions that the existing right should not go further than it did exist as of right. Therefore this so-called dispute being merely of a speculative kind, even if the Maharajah, on being applied to, declared his intention to prevent the right of way going beyond the mode in which it had hitherto been exercised, that did not constitute any dispute such as the Magistrate was entitled to take action upon.

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But in addition to that, it appears to me that the case was not one in which the Magistrate had authority to make any order, because the section does not enable a Magistrate to make a purely declaratory order. It only enables him to prevent arbitrary interruption by any person of rights actually enjoyed, which have been exercised by the public or a person or class of persons. The only right in question here was a right of using this road during the night. There is no evidence whatever to show that any person had ever exercised or claimed to exercise the right of passing over this road during the night. As I said before, it is quite conceivable that there should be a limited right of way, that is to say, a right of passing over the road by day and not by night, and the evidence shows that that restricted kind of right has never been interfered with. This was not, therefore, a case in which the Magistrate was entitled to interfere. I think his order in this case was made without authority and must be set aside.

The Deputy Commissioner, when examined in this case, stated very ingenuously, as it seems to me, that the reason why proceedings were taken in this particular form was, that the result would be to throw upon the Maharajah the costs of being plaintiff in the civil suit which it might be necessary to bring. That, of course, where the contending parties are both private individuals, is a very natural and justifiable course. But the propriety of it is not very clear where one of the parties is the Magistrate himself, in which case the conclusion in the Criminal Court may be said without any imputation on the presiding officer to have been somewhat of a foregone conclusion.

[PRIVY COUNCIL.]

SKINNER *vs.* ORDE . . . . . 1879 March 21st.

Procedure—Pauper Suit—Court Fees, Effect of payment of, pending Enquiry into Pauperism—Limitation.

Where, after a petition for leave to sue in *formâ pauperis* has been filed and pending proceedings taken to enquire into the pauperism, the petitioner pays the necessary amount of stamp fees into Court, the petition shall be treated for the purposes of limitation as a plaint from the day on which it was filed and not from the payment of the fees.

APPEAL from a decision of the High Court of Judicature, North-West Provinces, Allahabad.

The facts of this case are sufficiently set forth in the judgment of their Lordships (1) of the Privy Council, which is as follows:—

The decision of this appeal is attended with considerable difficulty, since it presents a case which is not provided for by the Code of Civil Procedure. It becomes of importance to the parties, because the decision of the point of practice determines the question whether or no the Statute of Limitation is a bar to the claim of the plaintiff. The original petition was filed in the Court of the Subordinate Judge of Meerut on the 20th February 1873. The claim of the plaintiff was to a share of the property devised by the will of the late Colonel Skinner. His claim arose upon the death of his father, Major Skinner, which occurred on the 27th April 1861. The petition set out all the particulars required in a plaint, and prayed that the plaintiff might be allowed to sue in *formâ pauperis*. The claim embraced landed property which was situate partly within the jurisdiction of the High Court of the North-Western Provinces and partly within the jurisdiction of the High Court of the Punjab. The Judge of Meerut, apparently of his own motion, rejected the petition, on the ground that the question of the plaintiff's pauperism could

(1) Sir James Colvile, Sir Montague E. Smith and Sir Robert P. Collier.

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be more conveniently tried in the Punjab. The plaintiff thereupon filed it in the Court of the Deputy Commissioner of Delhi, and on the 14th April 1873 an order was made by that Court, after examining witnesses, admitting the plaintiff's suit in *formâ pauperis*. Before proceeding further with the suit, the Deputy Commissioner applied to the High Court of the Punjab for authority to proceed under clause 13 of the Code of Civil Procedure (Act VIII of 1859). That clause enacts: "If the districts "within the limits of which the property is situate are subject to "different Sudder Courts, the application shall be submitted to the "Sudder Court to which the district in which the suit is brought "is subject, and the Sudder Court to which such application is "made, may, with the concurrence of the Sudder Court to which "the other district is subject, give authority to proceed with the "same." On the 29th of May 1873 the High Court of the Punjab, presumably not without having consulted the High Court of Allahabad, directed that "the plaint should be returned to the plaintiff, "with instructions that he should present it to some Court in the "North-West Provinces." Accordingly the plaintiff took the proceedings back to the Court of Meerut from which he had been originally driven, and on the 19th July 1873 an order of the Subordinate Judge of Meerut was made, "that the case be brought on the file, and numbered." Their Lordships think it must be assumed that this order was complied with, and that the plaint was brought upon the file, and was numbered.

The first question which arises is, whether the finding of the Deputy Commissioner of Delhi that the plaintiff was a pauper can be imported into the suit when it found its way upon the file of the Court at Meerut, and that depends upon the construction to be given to clauses 11, 12 and 13 of the Code of Civil Procedure. Undoubtedly, when a suit is in the position in which the present suit stood in the Court at Delhi, it would be convenient and proper when an application had been made by the Judge of Delhi Court to the High Court of the Punjab, and that Court is required, before it acts, to consult the Judges of the High Court in the jurisdiction to which the plaint is to go, that those two Courts having consulted together, should have power to direct that the case should be transferred in its then state to the Court

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to which they think it right and expedient that it should go. But the Legislation stops short of enacting that it should be so transferred. What it enacts is, that the Judge shall apply to the High Court to which he is subject for authority to proceed, and the Court to which such application is made may, with the concurrence of the other High Court, give authority to proceed. There is no express power to transfer. Their Lordships having come to the conclusion to decide the case in favor of the appellant upon another ground, do not desire unnecessarily to express an opinion upon this first point. There being a grave doubt, at the least, whether the two Courts have power to make the transfer, they think it would be a proper addition to be made to this clause that this power should be conferred upon them.

The other question which has been raised is as to the effect of the proceedings in the Court of Meerut, and whether the judgment of the High Court, affirming that of the Subordinate Judge of Meerut, is correct in holding that the suit is to be considered as instituted when the plaintiff paid the amount of the stamps into Court, and that the petition was converted into a plaint from that time only.

In order to explain the view their Lordships have taken of this point, it will be necessary to refer to some of the proceedings. The order of the 19th July 1873, directing the case to be put on the file and numbered, has been already adverted to. When that was done, the defendants put in written statements, objecting that the plaintiff ought to establish his position as a pauper in the Meerut Court, treating what had taken place at Delhi as irrelevant, and upon those statements, on the 10th November 1873, the Subordinate Judge of Meerut directed that the case could not be heard, and rejected the plaint. There was an appeal to the High Court from that decision, and on the 10th July 1874 the High Court held that the time of the abortive proceedings at Delhi should be deducted from the period of limitation, and "remanded the suit" to the Subordinate Judge, directing him to proceed with it. That being so, proceedings were taken by him with a view to an inquiry into the pauperism of the plaintiff. Issues were framed, and a day was fixed for the trial of those issues; the day so fixed was the 27th November 1874. On that

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day the plaintiff presented a petition, praying for leave to deposit the amount of the stamps, alleging that he had succeeded in negotiating a loan for a sum of money sufficient to cover the amount of the institution stamps. It appears that on the same day, having obtained the permission of the Subordinate Judge, the plaintiff paid the proper stamps into Court. That having been done, the defendants raised two objections: first, that the suit ought not to proceed, because the plaintiff had fraudulently applied to be made a pauper when he had property; and, secondly, that the suit should be regarded as instituted on the date the Court fee was paid, which was beyond the period of limitation. The Subordinate Judge went into evidence on the first issue, and found that there had been no fraud on the part of the plaintiff in filing a petition to be allowed to sue as a pauper, and therefore it must now be taken that that petition was filed *bonâ fide*, and in good faith. On the other point the Judge held in effect that he saw no reason why, upon payment of the fee, the suit should not be deemed to be instituted on the day "which the pauper admittance would have carried," and added, "The Court then would allow the case to proceed on its present basis, but at the same time would suggest to the defendant the advisability of appealing to the High Court to determine whether by the substitution of the institution fee the case is to be deemed a plaint and deemed to be filed on the day on which the application to sue in *formâ pauperis* was originally submitted." The Judge then directed that the application should be numbered and registered, and be deemed the plaint in the suit, and that a day be fixed for the settlement of issues. This was the first opinion of the Subordinate Judge, but he appears afterwards to have resiled from it, and to have framed issues, two of them raising the questions which are now before their Lordships for decision:—First, "Can 'an application' to be allowed to sue in *formâ pauperis* be converted into a suit as between parties at any subsequent date by filing the institution fee, and in the latter instance, from what date should the institution of suit be calculated?" The second, "Is the suit barred by efflux of time?" Three other issues were settled as to the merits of the case, and the Judge, after settling these issues, examined witnesses. On

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the 6th July 1875 he gave judgment. Having referred to the dates of the application to sue in *formâ pauperis* and to some of the other dates of the proceedings, he says: "The granting of the application then constitutes an essential ingredient to further progress, as an ordinary suit with the privilege of limitation, counting from the day the petition to sue in *formâ pauperis* was presented, and not from the date when it was registered under section 308. But it will be seen that prior to the application to sue in *formâ pauperis* was granted, and whilst the question was still under inquiry and investigation, the plaintiff has converted the matter into a regular suit, the consequence of which is, that he has, by his own act, given up the advantages or disadvantages (as the case might be) of the position he may have become possessed of. By such act the pauper application died a natural death, and by the conversion the regular suit came into operation on its own individual and inherent basis from date of such conversion, and as a consequence, in computing limitation, the computation must be made from date of such conversion, which places the plaintiff out of Court." No doubt, if the Judge is right, the plaintiff would be barred by the Statute of Limitations, and the plaint would be properly rejected. There was an appeal from that decision to the High Court, which affirmed it. The following passage of their judgment gives the view of the High Court on the question:—"But there is no provision in the law which allows the application, presented under section 299 of the Code, to be deemed the plaint in the suit when such application has been in effect revoked and superseded by the payment of the fees chargeable under the Court Fees Act. In such a case we conceive that the date of the presentation of the plaint and institution of the suit must be taken to be the date of the payment of fees." The High Court does not decide that the plaint ought to be rejected altogether. It seems to consider that the petition should be retained as a plaint, but that it should be taken to be converted into a plaint only from the day when those fees were paid.

Now a petition to sue in *formâ pauperis* contains all that a plaint is required to do. By section 300 "the petition shall contain the particulars required by section 26 of this Act in

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regard to plaints, and shall have annexed to it a schedule of any moveable or immoveable property belonging to the petitioner with the estimated value thereof, and shall be subscribed and verified in the manner hereinbefore prescribed for the subscription and verification of plaints." Therefore it contains in itself all the particulars the Statute requires in a plaint, and *plus* these a prayer that the plaintiff may be allowed to sue in *formâ pauperis*.

The Act provides what shall happen if the prayer of the petition be granted by section 308. It also provides by section 310 what shall be the effect of a rejection of the petition. But this case is one which the Statute has not in terms provided for. The intention of the Statute evidently was that, unless the petition was rejected, as it contained all the materials of the plaint, it should operate as a plaint without the necessity of filing a new one. Then what are the facts in this case? The petition is filed and proceedings are taken to inquire into the pauperism, which are delayed by various orders of the Court, after the plaintiff had been already bandied about from one Court to another until a very considerable period of time has elapsed. Then pending that enquiry, the plaintiff, by paying the amount of stamp fees into Court, admits that he is no longer desirous to sue as a pauper, and gives up so much of the prayer of his petition as asks to be allowed so to sue, but no more. The defendant, so far from being a sufferer by that change, is benefited as both parties will go on with the litigation on equal terms. Is there then anything in the Act which requires that in such a state of things the petition of plaint shall be rejected altogether, and the plaintiff be compelled to commence *de novo*? Their Lordships do not see their way to the middle course followed by the Court in holding that the petition was converted into a plaint from the date of the payment of the fees. To be logical, they should have rejected it altogether. The petition of plaint was placed upon the file and numbered on the 19th July 1873, and this is the plaint that is allowed to go on. Although the analogy is not perfect, what has happened is not at all unlike that which so commonly happens in practice in the Indian Courts, that a wrong stamp is put upon the plaint originally, and the proper stamp is afterwards affixed. The plaint is not converted into a plaint from that time only,

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but remains with its original date on the file of the Court, and becomes free from the objection of an improper stamp when the correct stamp has been placed upon it.

This case, which is not provided for by the Act, approaches more nearly to the state of things contemplated by section 308 than that contemplated by section 310. There are no negative words in the Act requiring the rejection of the plaint under circumstances like the present, nor anything in its enactments which would oblige their Lordships to say that this petition, which contains all the requisites which the Statute requires for a plaint, should not, when the money has been paid for the fees, be considered as a plaint from the date that it was filed. It is obvious that very great injustice might be done if this were not to be the practice. There could hardly be a stronger instance of the mischief which might arise than what would have happened in this case. Their Lordships, of course, say nothing about the merits of the case. The claim may be utterly untenable, but on the assumption that the claim is a good one, nothing more unjust to the plaintiff could have happened than that he should have been deprived by having done an act which is in itself meritorious, of the benefit which he would have had if he had been found to be a pauper. He was a pauper when his petition was filed. Supposing there had been any fraud found by the Judge, the considerations which would determine the judgment would then have been different.

Their Lordships have only to advert to the Statute of Limitations, Act IX of 1871. Their Lordships think that their decision is in no way inconsistent with this Act. The explanation in clause 4 is this: "A suit is instituted in ordinary cases when the plaint is presented to the proper officer in the case of a pauper, when his application for leave to sue as a pauper is filed." In their view the petition to sue as a pauper became a plaint, and under this Statute the suit must be deemed to be instituted when that application was filed.

In the result their Lordships will humbly advise Her Majesty to reverse both the decisions below, and to remand the case for trial on the merits. The respondents must pay the costs of the appeal.

[CRIMINAL APPELLATE JURISDICTION.]

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May 5th.

No. 221 of 1879.

IN THE MATTER OF TURIBULLAH AND OTHERS.

Committal to Sessions Court—Irregularity—Prejudging defence to charge committed to Sessions Court.

Upon the single charge of wrongful confinement preferred under section 342 of the Indian Penal Code, before a Joint Magistrate, the prisoners raised a defence justifying the confinement on the ground that the persons confined had been caught by them under circumstances which led to the belief that they had committed house-breaking by night with intent to commit theft. Enquiry having been made, the Magistrate committed the prisoner not only for wrongful confinement, but, disbelieving the defence, for fabricating false evidence and for bringing a false charge. The prisoners were tried by the Sessions Judge and found guilty on all three charges at one and the same time. *Held*, that the conviction on the last two charges was illegal, as by adding the additional charges the Magistrate had really prejudged the defence to the first charge.

Where the Court, without having first heard the evidence for the prosecution, examines the witnesses for the defence, he commits an irregularity, but if the prisoners are not materially prejudiced thereby, the conviction will not be set aside.

CRIMINAL APPEAL against a conviction passed by the Additional Sessions Judge of Backergunge.

The facts are these :—

The appellants, of whom there were five, were convicted under section 342, of the offence of causing wrongful confinement, and each sentenced to one year's rigorous imprisonment. One of them, Naimuddi, was further sentenced, under the same section, to pay a fine of Rs. 50, of which a portion is awarded as compensation to two of the prosecutors. The last four of the prisoners were also convicted of fabricating false evidence and sentenced Naimuddi to six years' rigorous imprisonment, and the other three to five years' rigorous imprisonment, and the sentence in each case was directed to take effect at the expiration of the

sentence that has been passed under the conviction for wrongful confinement.

The last four of the prisoners were also convicted of making a false charge under section 211, but no sentence has been passed in respect of that conviction.

It appears that the five prisoners were originally put upon their trial before the Joint Magistrate on a charge of wrongfully confining three persons, and on that charge alone. The defence of the first prisoner was a denial of any participation in the offence. The other four prisoners denied that they had confined one of the three persons, and with regard to the remaining two, namely, Jaharuddi and Yasin, raised the defence that they had a lawful excuse for confining those two, inasmuch as they were caught in the house of one of the prisoners, under circumstances which led to the belief that those too had committed house-breaking by night with intent to commit theft.

The Joint Magistrate had full power under the Code to try the prisoners for the offence of wrongful confinement, but instead of disposing of the case himself, committed the prisoners for trial before the Sessions Judge. In the course of the enquiry preliminary to the committal, the Joint Magistrate went at great length into the question of the sufficiency of the defence pleaded by the four prisoners, who justified the confinement of Jaharuddi and Yasin. He proceeded himself to the spot, where the house-breaking was alleged to have occurred, and by his direction certain witnesses were examined with reference to the alleged house-breaking. He came to the conclusion that the defence was false, and in committing the prisoners for trial, not only committed them upon the charge of wrongful confinement, which was the sole charge before him, but also upon a second charge of fabricating false evidence, and upon a third charge of bringing a false charge with intent to injure. The second charge was based upon the view which the Magistrate took of the evidence adduced by the four prisoners to support the justification which they had pleaded as their defence to the wrongful confinement of Jaharuddi and Yasin. The third charge was grounded on the Magistrate's view of the falsehood of the charge of house-breaking which the four last

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prisoners had preferred at the thanah against Jaharuddi and Yasin.

Baboo *Bhobun Mohun Doss*, for the Prisoners.

After stating the facts as above, the judgment of the High Court, (1) proceeded as follows :—

We think that the Magistrate, in sending up the four prisoners to be tried at one and the same time upon these three charges, committed a great error. The complaint laid before him by the prosecution related to the single offence of wrongful confinement. It was his plain duty, if he did not dispose of the case himself, to commit the prisoners for trial upon that charge alone, whatever his opinion might be of the sufficiency of the defence. To frame additional charges against the accused *ex mero motu* because the Magistrate disbelieved the defence, and to commit the accused for trial on all these charges at one and the same time, is a procedure unwarranted by the law, and a violation of the ordinary principles of fairness and justice, that ought to prevail in criminal trials. Inasmuch as the Magistrate did not dispose himself of the charge of wrongful confinement, but forwarded it to the Sessions Court for trial, it is surprising that he did not perceive, that in putting the accused upon their trial in respect of the two additional charges, he was really prejudging the defence which they had raised to the first charge. It is also a matter for surprise that when the case came before the Additional Sessions Judge for disposal, the great impropriety and irregularity of the proceedings of the Joint Magistrate did not attract the notice of the Judge. But he at once proceeded to try the prisoners upon all these three charges together, and in so doing, committed, as we find from the statement in his judgment, a further irregularity by commencing to examine the witnesses for the defence before he had heard the evidence for the prosecution. His reason for adopting this inversion of procedure is this, stated by himself, "because of the nature of the defence and of the charges against prisoners, who have admitted the seizure of some of the persons, with the illegal seizure of whom they are charged." The reason here stated is quite insufficient, even as regards the four accused who pleaded a justification.

(1) MORRIS and WHITE, *JJ.*

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The prosecution had to make out, not only that the three persons were confined in point of fact, but that they were wrongfully confined; and this they must do by producing evidence; and it is only, when sufficient evidence had been produced, that the accused could be called upon to go into their defence. As regards the first prisoner, Taribullah, the reason is not only insufficient, but has no application; for he did not join in the plea that was raised by the other four prisoners, but all along denied having anything to do with the wrongful confinement.

The Additional Judge, having commenced in this extremely irregular way with the evidence of the defence, then took the evidence for the prosecution, and arrived at the conclusion that the case for the prosecution was true, and that for the defence, false.

We are of opinion that the convictions thus obtained for fabricating false evidence, and for bringing a false charge, cannot stand.

With regard to the conviction under section 342, the vakeel for the prisoners admits that he is unable to show that the evidence does not warrant the conviction. We have, therefore, to consider whether the irregularities, which have been committed in the course of the trial, are such as to vitiate the conviction under that section, and amount to a mis-trial. Although the Additional Judge, in dealing with the charge of wrongful confinement, commenced irregularly with the evidence of the defence, yet, we think, that under the circumstances of this case, the prisoners were not materially prejudiced by this method of proceeding. The Judge and the assessors had, when the latter pronounced their opinion, and the former his decision, the whole evidence for the prosecution, as well as that for the defence, before them. No less than ten witnesses were examined on the question of the alleged house-breaking by Jaharuddi and Yasin; several of the witnesses being those whom the four last prisoners had themselves summoned. We have no reason to believe that the witnesses called for the defence would have been believed by the Judge, and the assessors, if they had been called in their proper order, which was before the close of the evidence for the prosecution, or that the witnesses for the prosecution, who spoke to the wrongful confine-

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ment, would have not been equally credited by the Judge a assessors, if they had been called before the witnesses for t defence instead of after them.

We, therefore, think, that while setting aside the convictions f fabricating false evidence, and for preferring a false charge, and t sentence which has been passed for the former offence, we are a position to affirm the conviction and sentence for causi wrongful confinement under section 342, which we accor ingly do.

[CIVIL APPELLATE JURISDICTION.]

April 1st.

No. 314.

PALUCKDHARY AND OTHERS (JUDGMENT-DEBTORS) . . . . . } APPELLANTS;

AND

RAJAH RADHA PURSHAD SINGH (DECREE-HOLDER) . . . . . } RESPONDENT.

Civil Procedure Code, Act X of 1877, sections 244 and 588 (j)—Appeal Execution Proceedings.

Where an order was made, under section 244 of the Code of Ci Procedure (Act X of 1877), that the rights and interests of the judgmer debtors should be sold in satisfaction of a sum found, in the course execution proceedings, to be due to the decree-holder in respect mesne profits, it was *held*, that under section 588 (j) of the same Cod there was no appeal from such order, the order not being of the san nature as appealable orders made in the course of a suit.

Dalpatbhai Bhagabhai vs. *Amarsang Khemabhai*, I. L. R., 2 Bon 553, cited and followed.

Chandhari Sital Pershad Singh vs. *Jamah Singh*, 4 C. L. R., 2 dissented from.

APPEAL from an order passed by the Subordinate Judge Shahabad.

The original decree in this case was obtained on the 4th Apr 1856, in the Court of the Judge of Ghazeepore. It was affirme by the Agra Sudder Dewany Court on the 29th November 185 but subsequently modified on review by the same Court on th 7th April 1866. This modified decree was subsequently, o the 31st March 1870, affirmed by the Judicial Committee of th Privy Council.

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Statement.

On the 11th November 1867, after the re-adjustment which was made by the Government of India of the boundary line between Lower Bengal and the North-Western Provinces, by which the whole or greater part of the property in dispute was transferred to Lower Bengal, the Principal Sudder Ameen of Ghazeepore, under section 285 of Act VIII of 1859, transferred the decree of the Sudder Dewany Court, dated 7th April 1866, to the District of Shahabad, for execution. The Judge of that district subsequently made over the case to the Sub-Judge, before whom repeated executions were sued out.

The judgment-debtor then objected before the Sub-Judge of Shahabad that the Court of the District of Ghazeepore was not competent to transfer the case, as it did, to the District of Shahabad nor was the Judge of the latter district competent to refer it to another Court for execution. Upon this objection the Court found that inasmuch as the land, which formed the subject of the suit in which the decree was made, had been transferred by an order of the Government to the District of Shahabad, that the Court of that district was fully competent to hold the proceedings which had been laid before it. The appeal against this finding preferred to the High Court was rejected on the 21st November 1877.

The application now under consideration was made on the 26th of June 1878, to the Subordinate Judge of Shahabad, for the sale of the right and interests of the judgment-debtors in certain property, in order to satisfy a sum found by that Judge in the execution proceedings which had been going on between the parties since 1867, to be due for mesne profits to the plaintiff. It was objected by the judgment-debtors that the Judge had no jurisdiction to entertain the application, as the execution proceedings had been void from the beginning, and further that the application was barred by limitation under Act XV of 1877, Article 179. The objections were over-ruled: the judgment-debtors appealed to the High Court.

Baboo *Mokesh Chunder Chowdhry*, and Baboo *Grish Chunder Chowdhry*, for the Appellants.

Baboo *Madhub Chunder Ghose*, Baboo *Bhowani Churn Dutt*, and Baboo *Jugdanund Mookerjee*, for the Respondents.

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Argument.

Baboo *Mohesh Chunder Chowdhry.*—This appeal arises out of an application made on the 6th June 1878, in proceedings in execution of a decree of a Sudder Dewany Court of Agra. The application is objected to on two grounds: (1*st*) that the execution proceedings had been carried on by the Court entirely without jurisdiction; and (2*ndly*) that the application was barred by limitation under article 179 of Act XV of 1877.

The date of the decree was April 7th, 1866. There was an appeal to the Privy Council, but that was dismissed in 1870.

Article 179, clause 4 of the Limitation Act, allows three years from the date of application to the proper Court for execution, or of taking some steps in aid of execution of the decree or order.

[GARTH, *C.J.*—Where there are a number of proceedings each application must follow the last preceding within three years.]

The question, therefore, here is, whether the Court before which these proceedings have been laid is the proper Court. Now Expl. II to that article defines the proper Court as the Court whose duty it is to execute the decree or order.

We say that the words 'proper Court' raise the same question as is raised in our first point with reference to the jurisdiction of the Court below to entertain the proceedings at all.

Under section 362 of the old Code it was laid down that an application for execution of the decree of an Appellate Court must be made to the Court which passed the first decree in the suit. The Court of Ghazeepore had no power to transfer the execution of its decree to that of Shahabad—*Rajeeb Ram Doss* vs. *Mahomed Hossein*, 6 W. R., Misc., 51.

[GARTH, *C.J.*—But under section 19 of Act XVI of 1868, the High Court has power, from time to time, to authorize the transfer of civil proceedings to be disposed by a Subordinate Judge or Moonsiff.]

In *Sheik Mohummed Kumrooddeen* vs. *Ujoobooonissa*, 1 N. W. P., All., 113, it was held that a Zillah Judge had no power to transfer his own decrees for execution to a Subordinate Court, unless specially authorized under that Act; while in *Chowdhry Hamedoollah* vs. *Muteeoonissa Bibee*, 15 W. R., 574, it was laid down that the transfer of execution proceedings was not such a transfer as could be made under section 19 of Act XVI, read in connection

with section 362 of the Civil Procedure Code. See also *Moonshee Aftaboodeen Ahmed* vs. *Mohini Mohun Dass*, 15 W. R., 48; *Kedar Nath Mahata* vs. *Bungshee Dhur Roy*, 17 W. R., 45, which also go to show that the transfer to the Subordinate Judge was improper. The original transfer here was also improper. Act XVI of 1868 had no reference to such a transfer.

[GARTH, *C.J.*—The present application is for mesne profits—a question wholly independent of the question of jurisdiction.]

The application was to sell the judgment-debtor's property in Shahabad, and I contend that the ascertainment of the mesne profits could only be made by the Court which passed the decree, viz., the Ghazeepore Court. The ascertainment of the mesne profits by the Shahabad Court is, therefore, a nullity, and the judgment-debtor's property cannot be sold to satisfy the mesne profits found by that Court to have accrued.

[GARTH, *C.J.*—You say this notwithstanding that you failed in another appeal (see *post*, p. 353), to set aside the proceedings. If you are right now the execution proceedings are a nullity whether set aside or not.]

[PRINSEP, *J.*—What do you say should have been the proper procedure?]

I say the Ghazeepore Court ought to have acted under section 284, and following sections. The application ought to have been made in the first instance to the Ghazeepore Court.

[GARTH, *C.J.*—How could it be the duty of the Court (according to section 285,) which had no longer anything to do with the land which was the subject of suit, to execute the decree? It was the duty of the Ghazeepore Court only until the land was transferred.]

Sections 284 and 285 are wide enough to support any contention.

[PRINSEP, *J.*—They don't apply.]

The cases I have already quoted were cited for the purpose of showing that the transfer was improper. I now wish to show that the proceedings themselves were improperly carried on, and I would refer to the case of *Shib Narain Shaha* vs. *Bepin Behary* [illegible], I. L. R., 3 Cal., 512, where it was laid down that the jurisdiction of a Court to which a decree has been transferred is strictly limited to carrying out that decree; and to the case of

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Argument.

Rajah Ojooderam Khan vs. *S. M. Nobinmoney Dassee*, 1 Jur., 369.

Baboo *Madhub Chunder Ghose.*—The application under c deration was made since the new Code came in force, and t fore there is no appeal.

Mohesh Chunder Chowdhry.—I say there is an appeal u section 588, (j) of that Code. I contend that inasmuch as o under section 244 as to questions relating to the executi a decree are appealable there is clearly an appeal here *Chandhari Sital Pershad Singh* vs. *Jumah Singh*, 4 C. L. R decided by AINSLIE and BROUGHTON, *J.J.*

[GARTH, *C.J.*—It does not appear that these learned Ju had their attention called to the recent case of *Dalpatbhai gabhai* vs. *Amarsang Khemabhai*, I. L. R., 2 Bom., 553, wh was held by MELVILL and KEMBALL, *J.J.*, that there wa appeal against an order made under section 244, determi questions between the parties as to the amount of mesne p recovered by the plaintiff.]

[PRINSEP, *J.*—It was also so held by a Division Bench of Court in Special Appeal No. 187 of 1878.]

Baboo *Madhub Chunder Ghose.*—Under section 588 (j) ther be no appeal. If the words "of the same nature with appea orders made in the course of a suit" had been omitted fro clause, there would doubtless have been an appeal. Exami the other clauses of the section, we will find that this order not fall under any other clause giving an appeal.

[GARTH, *C.J.*—If the order complained of had been an staying execution proceedings, there would have been an ap but, so far from being an order of that nature, it is an order warding proceedings. It is an order disallowing the deb plea of limitation.]

The judgment of the Court (1), which was as follows, delivered by

GARTH, *C.J.* GARTH, *C.J.* :—

The order, which is the subject of this appeal, was made in

(1) GARTH, *C.J.*, and PRINSEP, *J.*

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course of certain execution proceedings, which have been going on between these parties since the year 1866.

In those proceedings it was found by the Subordinate Judge of Shahabad, that a certain sum for mesne profits was due to the plaintiffs, and on the 26th of June 1878, an application was made to the same Judge by the plaintiffs, that the rights and interests of the judgment-debtors in certain property should be sold to satisfy the sum so found to be due.

The objections made to this application were two-fold :—

1*stly*.—That the execution proceedings had been carried on by the Subordinate Judge of Shahabad, entirely without jurisdiction, and that consequently he had no power to grant the application; and 2*ndly*.—That the application was barred by limitation under Article 179 of Act XV of 1877.

The Subordinate Judge considered, that as an application had been made to the Shahabad Court in furtherance of the execution proceedings within three years from the time when this application was made, both objections depended upon the same question, (see clause 4 of Article 179,) namely, whether the Shahabad Court was a competent Court to deal with the execution proceedings, and as he found this question in the affirmative, he granted the application.

The defendants then appealed to this Court, and a preliminary objection has been made here by the respondents, that no appeal lies against an order of this kind.

They contend that this order, though passed in the course of execution proceedings, instituted under the Civil Procedure Code of 1859, was, in fact, made under the provisions of the new Code of 1877, and when we consider the nature of the application, and of the order which was made upon it (which was in effect to grant the application,) it appears quite clear that the order was made under the new Code; and this is a point which is hardly contested by the appellants.

Then, as under section 588 of the new Code, there are only certain orders from which an appeal lies, we must see whether the order now appealed against is one of them.

The appellants contend that it is an order coming under clause of that section, that is to say, an order made under section

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244 upon a question which relates to the execution of a decree, and of the same nature as appealable orders made in the course of a suit.

There can be no doubt that the order is made under section 244, and upon a question which relates to the execution of a decree, but the question remains, whether it is an order *of the same nature as appealable orders made in the course of a suit.*

Now the only orders made in the course of a suit, which are appealable under the new Code, are those which are enumerated in section 588, and having looked carefully through those orders, we do not find any one of them which is at all of the same nature as the order which is here appealed against.

That being so, it seems impossible for us to say that this order, although it relates to the execution of a decree, and raises a most important question between these parties, is of the same nature as any appealable orders made in the course of a suit under the new Code.

We, therefore, hold the objection to be a good one; and consider that no appeal lies.

We have been referred during the argument to a case which was decided at Bombay by Mr. Justice MELVILL and Mr. Justice KEMBALL reported in 1 I. L. R., 2 Bom., 553,—*Dalpatbhai Bhagabhai* vs. *Amarsang Khemabhai*, in which that Court appears to have disallowed, upon similar grounds, an appeal against an order relating to execution proceedings; and we find, moreover, that this decision of the Bombay High Court has been followed by other Division Benches of this Court.

The appeal will be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

JOHOORY LALL . . . . . (PLAINTIFF) APPELLANT;

AND

BULLUB LALL BABOO . . . (DEFENDANT) RESPONDENT.

1879 *April 9th.*

No. 1398 of 1878

Interest—Arrears of Rent—Act VIII (B.C.) of 1869, *section* 21—*Discretion of Court as to interest.*

The omission to claim interest on arrears of rent, in past years, is not to be considered a waiver of the right to claim interest for all time.

Per Jackson, J.—The rule of law being that the instalments of unpaid rent *shall* be liable to interest at 12 per cent. (section 21 of Act VIII (B.C.) of 1869,) the discretion of the Court to allow interest or not upon over-due arrears of rent must be exercised upon very clear grounds.

Dindoyal Poramanick vs. *Prankishen Paul Chowdhry*, Marsh. 394, distinguished.

APPEAL from a decision of the Subordinate Judge of Hooghly, affirming the decree of the Moonsiff of Hurripal.

Baboo *Bosunto Coomar Bose*, for the Appellant.

Baboo *Omesh Chunder Banerjee*, for the Respondent.

The facts are fully stated in the judgments of the High Court, (1) which were as follows :—

JACKSON, *J.* :— JACKSON, *J.*

The plaintiff sued to recover arrears of rent with interest.

The defendant alleged that he had been accustomed to pay rent to his former zemindar, the Maharajah of Burdwan, *without* interest, no matter on what date or how long over-due the payment might have been made. He denied that he had received notice of the plaintiff's title, that is to say, of the assignment of the mehal to the plaintiff, and he also alleged that he had tendered the amount of rent which was due.

The Moonsiff found in favor of the plaintiff, and on that point there was no appeal by the defendant, that the latter had notice that he was to pay rent to the plaintiff, also that he had not made any tender or deposit of the rent, but he found that the late zemindar had been accustomed to receive rent without inter-

(1) JACKSON and MCDONELL, *J.J.*

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JOHOORY LALL v. BULLUB LALL BABOO.

Judgment.

JACKSON, J.

est, and from this he inferred that the defendant could not be made liable to pay any interest at all. The words of his judgment are these: "The numbers of dakhillas produced by the defendant show that no interest was charged, and the plaintiff, failing to produce the copy of judgment (as prayed by him on the 11th of September) to show that the interest was charged all along, the defendant cannot be liable for any interest at all."

From this part of the case the plaintiff appealed, and the appeal was heard by the Subordinate Judge. He says:—"The plaintiff has appealed on the ground that the Moonsiff was wrong in not allowing interest. That it is discretionary with the Courts to allow or not allow interest has been held by the High Court in several cases." The cases are not cited. "There is also a precedent in Marshall's Reports, page 394, to show that a claim to interest should be held as waived, if no interest has been previously charged. In the present case there is no proof to show that the defendant was charged with interest on any previous occasions. The plaintiff took time to file decrees showing that defendant was made liable to interest on previous occasions, but failed to produce any. Under the circumstances of the case I think the Moonsiff reasonably exercised his discretion, and I see no reason to interfere." Accordingly he dismissed the appeal.

Now the law, that is, section 21 of the Rent Act, provides:—"Any instalment of rent which is not paid on or before the day when the same is payable according to the pottah or engagement, or if there be no written specification of the time of payment, at or before the time when such instalment is payable according to established usage, shall be held to be an arrear of rent under this Act, and, unless otherwise provided by written agreement, shall be liable to interest at 12 per cent. per annum."

Now, no doubt, it has been held in some cases by this Court that the Courts have a discretion to allow interest upon over-due arrears of rent, but the rule of law being that the instalments of unpaid rent *shall* be liable to interest at 12 per cent., the discretion is one which must be exercised upon very clear grounds, and it certainly is no good ground to say that the tenant having failed to make payment of his rent on due date, because his landlord

had on previous occasions excused him the payment of interest upon it, therefore he should be absolved from the payment of interest ever afterwards, and that is the effect of the judgment in this case.

The lower Appellate Court refers to a judgment of Sir BARNES PEACOCK, in Marshall's Reports, page 394. That judgment is very familiar to me, because it was delivered in appeal from a decision passed by me as Judge of Nuddea, and I do not hesitate to say that any one who reads the judgment of Sir BARNES PEACOCK, in that case, and who can read between the lines will perceive the marks of disapproval with which he accepts the finding of the lower Appellate Court which he had before him. He says:—"It appears to the Court that the question whether the plaintiff had waived his claim to demand interest was one of fact, and that the Judge has found that the plaintiff did waive his claim. Our attention has been drawn to a decision of this Court, but that case is not similar to the case before us, for in that case the party averred that he had paid the instalments of rent on the precise dates upon which they fell due, and took issue on that point. In that case the Judge did not find a waiver, whereas in this case he does substantially find that the plaintiff may be considered to have waived his claim to interests. It is true that the kabuliuts stipulated for the payment of interest upon all sums not paid on a fixed date, but we find the landlord in this case accepted the sums due on account of principal on successive dates from time to time for a series of ten years without making any demand for interest, and without applying any of the sums paid during the above long period to the discharge of any interest which might be due. The interest in this case was reserved, not as penalty, but as a sum due under a contract, and it is not disputed that a Hindu, by the Hindu law, can give up or waive a portion of his claim verbally. For these reasons, and as the Judge has found as a fact that the plaintiff did waive his claim to interest, we cannot interfere with that "decision."

Now the older members of the profession will very well recollect that, after that judgment was delivered in 1863, the late Chief Justice had modified his view as to the power of the High Court to interfere in special appeal with findings arrived at by

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Judgment.

JACKSON, *J.*

the lower Appellate Court, and that cases in which dis findings of fact had been arrived at by the lower Appellate C have been on special appeal reversed. However, accepting judgment absolutely, it seems quite clear that the present ca distinguishable from that case. The Judge here does not that the plaintiff had waived his claim to interest. Wha says is:—In the present case there is no proof to show tha defendant was charged with interest on any previous occas That might very well be, and I have no doubt that previc the defendant had the advantage of an indulgent landlord did not claim interest on his arrears. But even if by any str of language or reasoning the Maharajah of Burdwan coul said to have waived his claim to interest that did not app the present landlord who was very strict in exercising his r as landlord under the Rent Act and, in the event of an ar claiming interest upon it. There was certainly no case of w on his part, and it lay on the Courts below to exercise, reason and on legal grounds, the discretion which this C has on certain occasions declared, lies in them to allow withhold interest.

There is a case cited in Master's Edition of the Law of L lord and Tenant—*Rutty Cant Bose* vs. *Gungadhur Biswas*, ho that "the mere fact that the landlord did not, on breac covenant, claim interest, instalment by instalment, for the tional time that the rent was not paid when due does not ju the plea that such interest, so stipulated for, is not due; does it raise the presumption that plaintiff had waived his c to interest." I think now that it would be monstrous to that the mere omission to claim interest for past years fr tenant who did not pay his rent on due dates should be o dered a waiver of the right to claim interest for all time.

We think the decision of the lower Appellate Court is neous, and that the case should go back to that Court in orde it may consider whether there is any ground for exercisin discretion for withholding interest for the particular arrears

McDONELL, *J.* McDONELL, *J.*:—

I concur in the order of remand.

[CIVIL APPELLATE JURISDICTION.]

NEHORA ROY AND OTHERS . . (PLAINTIFFS) APPELLANTS; 1879 *March* 31*st.*

AND

No. 1 of 1878.

RAJAH RADHA PERSHAD SINGH . (DEFDT.) RESPONDENT.

Issues, Amendment of—Additional issues—Pleadings, Adding issues not strictly arising upon—Discretion of Court—Act VIII of 1859, *section* 141—*Act X of* 1877, *section* 149.

Unless a Judge can see that an issue, proposed to be added or amended under section 141 of Act VIII of 1859, (corresponding with section 149 of Act X of 1877) will raise some point which is disclosed by the pleadings of the plaintiff on the one hand, or of the defendant on the other, he is clearly not bound under the obligatory words of the latter part of the section to allow the amendment.

Semble.—The Court has a discretion to allow issues to be framed which do not strictly arise upon matter within the scope of the pleadings, but in the exercise of that discretion the Court should consider all the surrounding circumstances.

Bizjie Bibi vs. *Monohur Doss*, 2 Ind. Jur., N. S., 118; *Wilkin* vs. *Reed*, 15 C. B., 192; *Lucas* vs. *Tarleton*, 3 H. & N., 116, cited and followed.

REGULAR APPEAL from a decree passed by the Subordinate Judge of Shahabad.

The facts in this case will be found set out in the case of *Peluckdhary* vs. *Rajah Radha Purshad Singh*, reported *ante* at p. 342.

Baboo *Mohesh Chunder Chowdhry*, and Baboo *Grish Chunder Chowdhry*, for the Appellants.

Baboo *Jugdanund Mookerjee*, and Baboo *Chunder Madhub Ghose*, for the Respondent.

The judgment of the High Court,(1) which was as follows, was delivered by

GARTH, *C.J.*:— GARTH, *C.J.*

We think that the appellants are not entitled, under the circumstances, to raise the point upon which they have appealed; and we consider that they were very properly precluded from raising that point in the Court below.

(1) GARTH, *C.J.*, and PRINSEP, *J.*

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NEHORA ROY v. RAJAH RADHA PERSHAD SINGH.

Judgment.

GARTH, C.J.

It is to be hoped that this is nearly the last scene in a l series of litigation, which has been going on between these par for upwards of twenty years.

In the year 1860, a final decree was made by the Sudder C at Agra, which determined the rights of the parties in a suit wl had been going on for a very long time; and that Court sent decree to the Court of Ghazeepore, which was the Court of F Instance, to be executed.

In January 1867, a re-adjustment was made by the Governm of India of the boundary line between Lower Bengal and the Nor West Provinces, by means of which the whole or the greater p of the property in dispute, which had formerly belonged to North-West Provinces, became a portion of Lower Bengal; an the Court of Ghazeepore had no longer any jurisdiction over property which had come within the jurisdiction of the Court Shahabad, the Judge sent the case to the Subordinate Jud Court at Shahabad, in order that the execution proceedings sh be carried out there.

For many years after this transfer, the proceedings, which w very lengthy and complicated, were carried on under the direc of that Court. No objection was made by either party that Court at Shahabad had not jurisdiction to entertain them. A eventually, after that Court had arrived at a final decision, case was appealed to the High Court here, and was heard b Division Bench, composed of Mr. Justice KEMP and Mr. Jus PONTIFEX.

This was in March 1876; and still no objection was made either party to the jurisdiction of the Shahabad Court in the f in which it is now raised. In point of fact the present appella submitted themselves during all this time to the Shahabad Cou jurisdiction, and fought the case there from one stage to anot in the hope that the proceedings would be carried out in acc ance with their views.

They were content to take the chance of this. They appe to the High Court upon the merits of the case, without tak the present objection to the jurisdiction, and the High C eventually decided against them.

They then almost contemporaneously commenced two differ

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NEHORA ROY v. RAJAH RADHA PERSHAD SINGH.

Judgment.

GARTH, *C.J.*

proceedings, one in the Court at Ghazeepore, and one in the Court at Shahabad. They made an application to the Judge at Ghazeepore, to set aside the execution proceedings, upon the ground that the certificate by which they were transmitted to the Subordinate Judge of Shahabad, under section 284 of the Code, had been illegally issued by the Subordinate Judge of Ghazeepore, and that those proceedings ought to have been held before the District Court at Ghazeepore which passed the decree.

In the Court at Shahabad they brought this present suit, and the claim made in their plaint was not to set aside the execution proceedings, upon the ground that they were without jurisdiction, but on the contrary, admitting the jurisdiction of the Shahabad Court, they complained that the proceedings had been carried out in certain respects contrary to the intention and directions of the Sudder Court at Agra.

The defendant's answer, *inter alia*, to that plaint was, that the matters regarding which the plaintiffs now sued could only be determined in the course of execution of the decree under section 11 of Act XXIII of 1861, and that they had taken a wrong course in bringing this suit.

After the written statement had been put in, the issues were settled. They were framed so as to raise the points relied upon by the parties in the plaint and written statement, and no suggestion was made at that time that the execution proceedings were void or illegal.

But on the 6th of August 1877, it appears that an application was made by the plaintiffs to have another issue framed for the purpose of raising the question whether those proceedings are not altogether void, upon the ground that the Shahabad Court had no jurisdiction to entertain them. The Subordinate Judge, however, considered that the application was one which in the exercise of his discretion he might grant or refuse, and he accordingly refused it.

It is clear that what induced the plaintiffs to make this application on the 6th of August was, that they had received information that two days before, on the 4th of August, upon the application which they had made to the Court at Ghazeepore, the

[illegible] in their favour that the certificate had [illegible] Court at Shahabad.

[illegible] Subordinate Judge at Shahabad, having [illegible] application to add an issue, proceeded to [illegible] the other issues against the plaintiffs.

[illegible] now appealed, and the only points which [illegible]

[illegible] Subordinate Judge ought to have allowed the [illegible] named: and

[illegible] even under the issues as fixed, the plaintiffs had a [illegible] question of jurisdiction.

[illegible] both sides very fully upon these points; and [illegible] opinion that the Judge in the Court below had [illegible] exercise of his discretion, to grant or refuse the [illegible], and that he was quite justified under the circumstances in exercising it as he did.

It has been strongly pressed upon us that under section 141 of the Code of Civil Procedure, the addition of the proposed issue here was an amendment of the record, which the Court was bound to make, upon the ground *that it was necessary for determining the real question or controversy between the parties.*

The power of amending issues, which is given to the Courts of this country by section 141 of the Code, is almost in the same language as the power of amendment given to Judges in England by the 222nd section of the common law Procedure Act, 1852; and it has been held here, as well as in the English Courts, that a Judge is not bound to make such amendments, except for the purpose of more effectually putting in issue and trying the real question or questions in controversy, as *disclosed by the pleadings on either side*, (see *Bizjie Bibi* vs. *Monohur Doss*, 2 Ind. Jur. N. S., 113) and in England (See *Wilkin* vs. *Reed*, 15 C. B., 192; *Lucas* vs. *Tarleton*, 3 H. and N., 116.)

The pleadings here consist of the plaint and written statements, and unless a Judge can see that the issue proposed to be added or amended will raise some point which is disclosed by the plaintiff's pleading on the one hand, or by the defendant's on the other, he is clearly not bound under the obligatory words of the latter part of the section to allow the amendment.

It is true that in some cases the Courts, in the exercise of their discretion, have been allowed under special circumstances to go beyond this line; and when no injustice would be done to either party to allow issues to be raised upon matter which does not strictly come within the proper scope of the pleadings, but then the amendment must be made under the first part of the section, which apparently gives a discretion to the Judge, and not under the obligatory words of the latter portion of the section.

Now in this case, it is quite clear that the point sought to be raised by the plaintiffs in the proposed issue was never suggested in the plaint, and that it never occurred to the plaintiffs till after the issues had been fixed for trial, and until they had heard of the decision of the Court of Ghazeepore.

It was an entirely new issue upon an entirely new point, and if it could be raised at all, the case was clearly one of those in which it was for the Judge, in his discretion, to allow the amendment or not.

Then, considering that for ten years past the appellants had been submitting to the jurisdiction of the Shahabad Court, and taking part in carrying out the execution proceedings there; considering also that when they appealed the case to the High Court in 1874 they never thought of raising this question of jurisdiction; considering also that in the present suit they never thought of raising this issue until they had heard the opinion which had been expressed by the Judge of Ghazeepore, we think that the Judge acted very rightly, after this long series of litigation, in not allowing the plaintiffs, at that stage of the case, to raise a point which after all was foreign to the merits.

We are now asked on appeal to say that the Judge has exercised his discretion improperly, and to allow the plaintiffs to raise this issue. We are clearly of opinion that, if we have a right to interfere at all with the exercise of the Judge's discretion, we ought certainly not to do so in this instance, and the more so, perhaps, because we are now informed that the Allahabad High Court has reversed the decision of the Judge of Ghazeepore. We also think it perfectly clear that, upon the issues already raised, it was not open to the plaintiffs to raise the question of jurisdiction.

The appeal is dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

1879 *April* 10*th*.

No. 636 *of* 1878

NANAK CHAND AND ANOTHER . (PLAINTIFFS) APPELLANTS;

AND

GOSSAIN LUCHMEE NARAIN PUREE AND OTHERS . . . . . (DEFENDANTS) } RESPONDENTS.

Possession, Suit for—Priority of Mortgages of same Property—Possession, Right to present—Effect of prior sale in execution where there are two decrees on mortgages of same property.

Where a suit for possession of certain property was brought against the defendants who had been let into possession of certain lands as purchasers of the right, title and interest of the mortgagor, at a sale in execution of decree upon a mortgage of that property, by the plaintiffs who had also obtained a decree but subsequently to that of defendants, upon a mortgage of the same property, executed on the same day as the defendants' mortgage, and at a sale in execution of such decree, had purchased the right and interest of the mortgagor, it was *held* that the defendants, under their purchase, were entitled to the present right of possession, and that the plaintiffs could not, in a suit for possession only, raise the question as to whose mortgage was prior in point of time.

Per GARTH, *C J.*—The right to the possession of the property cannot depend upon which of the mortgages was first.

APPEAL from a decision passed by the Subordinate Judge of Gya, reversing the decree of the Second Sudder Moonsiff of that district.

The plaintiffs Nanak Chand and Mussamut Gelo Bibee in this case sued for possession of a one-third of a 5-annas 4-pie share of the entire Mouzah Bhundagur, on the basis of a sale certificate, dated 16th June 1875, and a kobala, dated 22nd March 1877, executed by one Kesho Lall, in favour of the second plaintiff.

It seems, from the documentary evidence filed by the parties, that one Jhem Narain executed two mortgages on the same day, the 2nd July 1868, of the same property to different people, in consideration of loans advanced by them—the one in favour of one Luchmun Lall and the other in favour of Nanak Chand and Kesho Lall.

1879

NANAK CHAND v. GOSSAIN LUCHMEE NARAIN PUREE.

Statement.

'th January 1869 Luchman Lall obtained a decree
ıortgage for the sale of the mortgaged property, and
ı February of the same year attached the property in
)f his decree. The property was sold in execution, and
ɔn the 28th June 1869 was purchased by Jamiat Lall,
ler, dated 14th September following, was issued for
:o be given to the purchaser.

hand and Kesho Lall also sued upon their mortgage,
29th March 1869, obtained a decree for the sale of
:operty. At the sale in execution of their decree they
the right and interest of their debtor on the 24th
1874. On the 16th June 1875 an order was made for
:o be delivered up to them. It may be observed that
xecution sale was subsequent to the decree obtained
Chand and Kesho Lall. By a kobala, dated 2nd
7, the latter transferred his right under the purchase
eptember 1874 to Mussamut Gelo Bibi, the second

ıall having died, his widow Mussamut Teluckdye was
:y to the suit. Gossain Luchmee Narain Puree, who
ɨginally a party to the suit, filed a written statement,
have purchased the property at the first sale through
l, and to have been put in possession as such pur-

ɔrdinate Judge decided that the claim of the defendant
ıchmee Narain Puree to possession was preferable to
plaintiffs, on the ground that the purchase made by
place first, and dismissed the suit without having
nquiry as to which of the mortgages, in respect of
ecrees were made, was executed first.

ntiffs thereupon appealed to the High Court, on the
ter alia, that priority of attachment and sale under the
ees conferred on the defendant Gossain no right of
as against the plaintiffs, and that the defendants had
ith notice of the first plaintiff's mortgage.

Mahomed Yusoof, for Appellants.

der Madhub Ghose, for Respondents.

[CIVIL APPELLATE JURISDICTION.]

NUNDO KISHORE LALL (PLAINTIFF) . . APPELLANT;

AND

MUSSAMUT RAM SOOKHA KOOER (DEFENDANT) . . . . . RESPONDENT.

1879
May 5th.

No. 744 of 1878.

Limitation Act, IX of 1871, *section* 20—*Acknowledgment of debt in an unregistered document—Evidence—Alteration in document.*

The defendant on the 11th April 1875 entered into an agreement to pay off a debt due upon a registered bond, dated February 3rd, 1865, by a sale under a kobala of certain property. The kobala contained a clear acknowledgment of the debt, but on its being presented for registration, it was found that the original date, which was admitted by defendant, had been altered to the 11th August, and that the document, on that account, could not be registered. The transaction having fallen through for want of registration, the plaintiff sued upon the bond. The defendant pleaded the debt was barred as having been brought more than six years after the date of the bond.

Held, that the document, although inadmissible in evidence in respect of the property covered by it, was admissible as evidence of an acknowledgment on the 11th April 1875 of the debt to the plaintiff, and that under Act IX of 1871, section 20, the suit was not barred by limitation.

APPEAL from a decision passed by the Second Subordinate Judge of Tirhoot, reversing the decree of the Moonsiff of Tajpore.

Baboo *Chunder Madhub Ghose*, for the Appellant.

Baboo *Hem Chunder Bannerjee*, for the Respondent.

The facts are sufficiently set out in the judgment of the High Court, (1) which was as follows:—

This suit is brought for the recovery of money due under a registered bond, dated the 3rd February 1868, executed by the husband of the defendant in favor of the plaintiff. The stipulated date of repayment was the 25th May 1869. The present suit was brought on the 21st November 1876. The principal

(1) MITTER and TOTTENHAM, *J.J.*

question taken by the defendant is, that the claim is barred by limitation, and it is apparently so barred because the suit has not been brought within six years from the 25th May 1869. But the plaintiff's contention in the Courts below was that the claim was not barred under the provisions of section 20 of Act IX of 1871, which governs the present suit.

It has been alleged that in the year 1875 there was an agreement between the plaintiff and the defendant's husband to pay off the rent due under this bond, by the sale of certain property belonging to the debtor, to the creditor, and that the terms of this agreement were reduced to writing, and a kobala was executed by the defendant's husband in favor of the plaintiff. It is admitted that this kobala was written some time in the year 1875. The plaintiff's contention was, that in this kobala there was a clear acknowledgment on the part of the debtor of his liability under the bond, and that as this acknowledgment was within six years from the date of the suit, the claim was not barred under the provisions of the section aforesaid.

It appears that this alleged deed of sale, in which the acknowledgment in question is contained, was presented for registration. The defendant's husband admitted the document as having been executed by him before the Registrar, but he alleged that the date which the document originally bore was the 11th April which had been altered to the 11th August, and the only question before the Registrar was, whether it was so altered or not. Because if the document was really dated the 11th April 1875, under the Registration Law it was not admissible to registration, it having being filed before the Registrar after the expiration of the time prescribed by that law. The Registrar decided that question in favor of the husband of the defendant, and committed the plaintiff to the Criminal Court on a charge of having altered the document in question. The plaintiff was convicted and punished by the Session's Court. Under these circumstances the question we have to decide is, whether the plaintiff's claim is barred by limitation.

The Moonsiff was of opinion that under section 20 of the Limitation Act of 1871 the claim was not barred, because in the deed of sale, executed by the defendant's husband in favor of the

plaintiff, which transaction afterwards fell through for want of registration, the defendant's husband distinctly acknowledged that he was liable for the amount due under the bond, and that acknowledgment being within six years from the date of suit the Moonsiff over-ruled the plea of limitation.

On appeal the Subordinate Judge is of opinion that the alleged deed of sale upon which the plaintiff relies as containing an acknowledgment by the defendant's husband of his liability under the bond, having been altered in respect of its date, and the plaintiff having been punished by the Criminal Court for the alteration, he is not entitled to take any advantage of that document, and that therefore he cannot rely upon it in order to remove the plea in bar which has been set up against him. The Subordinate Judge is further of opinion that, under the circumstances set forth above, that document is not admissible in evidence. He has accordingly decreed the appeal of the defendant and dismissed the plaintiff's suit.

We are of opinion that the view taken by the Subordinate Judge is erroneous. Although the document is not admissible as evidence in respect of any question relating to the property covered by it, still it may be good evidence between the parties for any other purpose. And the fact that there was an alteration in the date of the document amounting to forgery, would not make it wholly inadmissible evidence. We are, therefore, of opinion that the grounds upon which the lower Appellate Court has refused to look into this document are not tenable.

But the learned pleader, who appears before us for the respondent, has relied upon some other grounds to support the decree of the lower Appellate Court. He contends that, even admitting this document as evidence, it has not the effect of saving the plaintiff's claim from being barred by limitation. The pleader for the respondent urges that the document does not contain an unqualified admission of the debtor's liability as a subsisting liability; but that on the contrary it declares the liability to be discharged by the sale of the property covered by the kobala. We have had that document read to us, and we think that there is clearly an unqualified admission of this nature, although, no doubt, the document goes on to provide that the liability of the

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NEHORA ROY v. RAJAH RADHA PERSHAD SINGH.

Judgment.

GARTH, *C.J.*

It is to be hoped that this is nearly the last scene in a lo series of litigation, which has been going on between these parti for upwards of twenty years.

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For many years after this transfer, the proceedings, which we very lengthy and complicated, were carried on under the directi of that Court. No objection was made by either party that t Court at Shahabad had not jurisdiction to entertain them. A eventually, after that Court had arrived at a final decision, t case was appealed to the High Court here, and was heard by Division Bench, composed of Mr. Justice KEMP and Mr. Justi PONTIFEX.

This was in March 1876; and still no objection was made b either party to the jurisdiction of the Shahabad Court in the for in which it is now raised. In point of fact the present appellan submitted themselves during all this time to the Shahabad Court' jurisdiction, and fought the case there from one stage to anothe in the hope that the proceedings would be carried out in accord ance with their views.

They were content to take the chance of this. They appeal to the High Court upon the merits of the case, without takin the present objection to the jurisdiction, and the High Co eventually decided against them.

They then almost contemporaneously commenced two differe

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NEHORA ROY v. RAJAH RADHA PERSHAD SINGH.

Judgment.

GARTH, *C.J.*

proceedings, one in the Court at Ghazeepore, and one in the Court at Shahabad. They made an application to the Judge at Ghazeepore, to set aside the execution proceedings, upon the ground that the certificate by which they were transmitted to the Subordinate Judge of Shahabad, under section 284 of the Code, had been illegally issued by the Subordinate Judge of Ghazeepore, and that those proceedings ought to have been held before the District Court at Ghazeepore which passed the decree.

In the Court at Shahabad they brought this present suit, and the claim made in their plaint was not to set aside the execution proceedings, upon the ground that they were without jurisdiction, but on the contrary, admitting the jurisdiction of the Shahabad Court, they complained that the proceedings had been carried out in certain respects contrary to the intention and directions of the Sudder Court at Agra.

The defendant's answer, *inter alia*, to that plaint was, that the matters regarding which the plaintiffs now sued could only be determined in the course of execution of the decree under section 11 of Act XXIII of 1861, and that they had taken a wrong course in bringing this suit.

After the written statement had been put in, the issues were settled. They were framed so as to raise the points relied upon by the parties in the plaint and written statement, and no suggestion was made at that time that the execution proceedings were void or illegal.

But on the 6th of August 1877, it appears that an application was made by the plaintiffs to have another issue framed for the purpose of raising the question whether those proceedings are not altogether void, upon the ground that the Shahabad Court had no jurisdiction to entertain them. The Subordinate Judge, however, considered that the application was one which in the exercise of his discretion he might grant or refuse, and he accordingly refused it.

It is clear that what induced the plaintiffs to make this application on the 6th of August was, that they had received information that two days before, on the 4th of August, upon the application which they had made to the Court at Ghazeepore, the

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Judge there had decided in their favour that the certificate had been illegally sent to the Court at Shahabad.

In this suit then the Subordinate Judge at Shahabad, having refused the plaintiffs' application to add an issue, proceeded to try the case, and decided the other issues against the plaintiffs.

The plaintiffs have now appealed, and the only points which they raise, are:—

1*st.*—That the Subordinate Judge ought to have allowed the additional issue to be framed; and

2*ndly.*—That even under the issues as fixed, the plaintiffs had a a right to raise the question of jurisdiction.

We have heard both sides very fully upon these points; and we are clearly of opinion that the Judge in the Court below had a right, in the exercise of his discretion, to grant or refuse the application, and that he was quite justified under the circumstances in exercising it as he did.

It has been strongly pressed upon us that under section 141 of the Code of Civil Procedure, the addition of the proposed issue here was an amendment of the record, which the Court was bound to make, upon the ground *that it was necessary for determining the real question or controversy between the parties.*

The power of amending issues, which is given to the Courts of this country by section 141 of the Code, is almost in the same language as the power of amendment given to Judges in England by the 222nd section of the common law Procedure Act, 1852; and it has been held here, as well as in the English Courts, that a Judge is not bound to make such amendments, except for the purpose of more effectually putting in issue and trying the real question or questions in controversy, as *disclosed by the pleadings on either side,* (see *Bizjie Bibi* vs. *Monohur Doss,* 2 Ind. Jur. N. S., 118) and in England (See *Wilkin* vs. *Reed,* 15 C. B., 192; *Lucas* vs. *Tarleton,* 3 H. and N., 116.)

The pleadings here consist of the plaint and written statements, and unless a Judge can see that the issue proposed to be added or amended will raise some point which is disclosed by the plaintiff's pleading on the one hand, or by the defendant's on the other, he is clearly not bound under the obligatory words of the latter part of the section to allow the amendment.

It is true that in some cases the Courts, in the exercise of their discretion, have been allowed under special circumstances to go beyond this line; and when no injustice would be done to either party to allow issues to be raised upon matter which does not strictly come within the proper scope of the pleadings, but then the amendment must be made under the first part of the section, which apparently gives a discretion to the Judge, and not under the obligatory words of the latter portion of the section.

Now in this case, it is quite clear that the point sought to be raised by the plaintiffs in the proposed issue was never suggested in the plaint, and that it never occurred to the plaintiffs till after the issues had been fixed for trial, and until they had heard of the decision of the Court of Ghazeepore.

It was an entirely new issue upon an entirely new point, and if it could be raised at all, the case was clearly one of those in which it was for the Judge, in his discretion, to allow the amendment or not.

Then, considering that for ten years past the appellants had been submitting to the jurisdiction of the Shahabad Court, and taking part in carrying out the execution proceedings there; considering also that when they appealed the case to the High Court in 1874 they never thought of raising this question of jurisdiction; considering also that in the present suit they never thought of raising this issue until they had heard the opinion which had been expressed by the Judge of Ghazeepore, we think that the Judge acted very rightly, after this long series of litigation, in not allowing the plaintiffs, at that stage of the case, to raise a point which after all was foreign to the merits.

We are now asked on appeal to say that the Judge has exercised his discretion improperly, and to allow the plaintiffs to raise this issue. We are clearly of opinion that, if we have a right to interfere at all with the exercise of the Judge's discretion, we ought certainly not to do so in this instance, and the more so, perhaps, because we are now informed that the Allahabad High Court has reversed the decision of the Judge of Ghazeepore. We think it perfectly clear that, upon the issues already raised, it was not open to the plaintiffs to raise the question of jurisdiction. The appeal is dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

1879 *April* 10*th*.

No. 636 of 1878

NANAK CHAND AND ANOTHER . (PLAINTIFFS) APPELLANTS;

AND

GOSSAIN LUCHMEE NARAIN PUREE AND OTHERS . . . . . (DEFENDANTS) } RESPONDENTS.

Possession, Suit for—Priority of Mortgages of same Property—Possession, Right to present—Effect of prior sale in execution where there are two decrees on mortgages of same property.

Where a suit for possession of certain property was brought against the defendants who had been let into possession of certain lands as purchasers of the right, title and interest of the mortgagor, at a sale in execution of decree upon a mortgage of that property, by the plaintiffs who had also obtained a decree but subsequently to that of defendants, upon a mortgage of the same property, executed on the same day as the defendants' mortgage, and at a sale in execution of such decree, had purchased the right and interest of the mortgagor, it was *held* that the defendants, under their purchase, were entitled to the present right of possession, and that the plaintiffs could not, in a suit for possession only, raise the question as to whose mortgage was prior in point of time.

Per GARTH, *C J.*—The right to the possession of the property cannot depend upon which of the mortgages was first.

APPEAL from a decision passed by the Subordinate Judge of Gya, reversing the decree of the Second Sudder Moonsiff of that district.

The plaintiffs Nanak Chand and Mussamut Gelo Bibee in this case sued for possession of a one-third of a 5-annas 4-pie share of the entire Mouzah Bhundagur, on the basis of a sale certificate, dated 16th June 1875, and a kobala, dated 22nd March 1877, executed by one Kesho Lall, in favour of the second plaintiff.

It seems, from the documentary evidence filed by the parties, that one Jhem Narain executed two mortgages on the same day, the 2nd July 1868, of the same property to different people, in consideration of loans advanced by them—the one in favour of one Luchmun Lall and the other in favour of Nanak Chand and Kesho Lall.

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Statement.

On the 7th January 1869 Luchman Lall obtained a decree upon his mortgage for the sale of the mortgaged property, and on the 13th February of the same year attached the property in execution of his decree. The property was sold in execution, and at the sale on the 28th June 1869 was purchased by Jamiat Lall, and an order, dated 14th September following, was issued for possession to be given to the purchaser.

Nanak Chand and Kesho Lall also sued upon their mortgage, and, on the 29th March 1869, obtained a decree for the sale of the same property. At the sale in execution of their decree they purchased the right and interest of their debtor on the 24th September 1874. On the 16th June 1875 an order was made for possession to be delivered up to them. It may be observed that the first execution sale was subsequent to the decree obtained by Nanak Chand and Kesho Lall. By a kobala, dated 2nd March 1877, the latter transferred his right under the purchase of 24th September 1874 to Mussamut Gelo Bibi, the second plaintiff.

Jamiat Lall having died, his widow Mussamut Teluckdye was made a party to the suit. Gossain Luchmee Narain Puree, who was not originally a party to the suit, filed a written statement, claiming to have purchased the property at the first sale through Jamiat Lall, and to have been put in possession as such purchaser.

The Subordinate Judge decided that the claim of the defendant Gossain Luchmee Narain Puree to possession was preferable to that of the plaintiffs, on the ground that the purchase made by him took place first, and dismissed the suit without having made any enquiry as to which of the mortgages, in respect of which the decrees were made, was executed first.

The plaintiffs thereupon appealed to the High Court, on the grounds, *inter alia*, that priority of attachment and sale under the circumstances conferred on the defendant Gossain no right of possession as against the plaintiffs, and that the defendants had purchased with notice of the first plaintiff's mortgage.

Moonshee *Mahomed Yusoof*, for Appellants.

Baboo *Chunder Madhub Ghose*, for Respondents.

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Judgment.

GARTH, *C.J.*

It is to be hoped that this is nearly the last scene in a long series of litigation, which has been going on between these parties for upwards of twenty years.

In the year 1860, a final decree was made by the Sudder Court at Agra, which determined the rights of the parties in a suit which had been going on for a very long time; and that Court sent the decree to the Court of Ghazeepore, which was the Court of First Instance, to be executed.

In January 1867, a re-adjustment was made by the Government of India of the boundary line between Lower Bengal and the North-West Provinces, by means of which the whole or the greater part of the property in dispute, which had formerly belonged to the North-West Provinces, became a portion of Lower Bengal; and as the Court of Ghazeepore had no longer any jurisdiction over the property which had come within the jurisdiction of the Court of Shahabad, the Judge sent the case to the Subordinate Judge's Court at Shahabad, in order that the execution proceedings should be carried out there.

For many years after this transfer, the proceedings, which were very lengthy and complicated, were carried on under the direction of that Court. No objection was made by either party that the Court at Shahabad had not jurisdiction to entertain them. And eventually, after that Court had arrived at a final decision, the case was appealed to the High Court here, and was heard by a Division Bench, composed of Mr. Justice KEMP and Mr. Justice PONTIFEX.

This was in March 1876; and still no objection was made by either party to the jurisdiction of the Shahabad Court in the form in which it is now raised. In point of fact the present appellants submitted themselves during all this time to the Shahabad Court's jurisdiction, and fought the case there from one stage to another in the hope that the proceedings would be carried out in accordance with their views.

They were content to take the chance of this. They appealed to the High Court upon the merits of the case, without taking the present objection to the jurisdiction, and the High Court eventually decided against them.

They then almost contemporaneously commenced two different

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proceedings, one in the Court at Ghazeepore, and one in the Court at Shahabad. They made an application to the Judge at Ghazeepore, to set aside the execution proceedings, upon the ground that the certificate by which they were transmitted to the Subordinate Judge of Shahabad, under section 284 of the Code, had been illegally issued by the Subordinate Judge of Ghazeepore, and that those proceedings ought to have been held before the District Court at Ghazeepore which passed the decree.

In the Court at Shahabad they brought this present suit, and the claim made in their plaint was not to set aside the execution proceedings, upon the ground that they were without jurisdiction, but on the contrary, admitting the jurisdiction of the Shahabad Court, they complained that the proceedings had been carried out in certain respects contrary to the intention and directions of the Sudder Court at Agra.

The defendant's answer, *inter alia*, to that plaint was, that the matters regarding which the plaintiffs now sued could only be determined in the course of execution of the decree under section 11 of Act XXIII of 1861, and that they had taken a wrong course in bringing this suit.

After the written statement had been put in, the issues were settled. They were framed so as to raise the points relied upon by the parties in the plaint and written statement, and no suggestion was made at that time that the execution proceedings were void or illegal.

But on the 6th of August 1877, it appears that an application was made by the plaintiffs to have another issue framed for the purpose of raising the question whether those proceedings are not altogether void, upon the ground that the Shahabad Court had no jurisdiction to entertain them. The Subordinate Judge, however, considered that the application was one which in the exercise of his discretion he might grant or refuse, and he accordingly refused it.

It is clear that what induced the plaintiffs to make this application on the 6th of August was, that they had received information that two days before, on the 4th of August, upon the application which they had made to the Court at Ghazeepore, the

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Judgment.

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Judge there had decided in their favour that the certificate had been illegally sent to the Court at Shahabad.

In this suit then the Subordinate Judge at Shahabad, having refused the plaintiffs' application to add an issue, proceeded to try the case, and decided the other issues against the plaintiffs.

The plaintiffs have now appealed, and the only points which they raise, are:—

1*st.*—That the Subordinate Judge ought to have allowed the additional issue to be framed; and

2*ndly.*—That even under the issues as fixed, the plaintiffs had a a right to raise the question of jurisdiction.

We have heard both sides very fully upon these points; and we are clearly of opinion that the Judge in the Court below had a right, in the exercise of his discretion, to grant or refuse the application, and that he was quite justified under the circumstances in exercising it as he did.

It has been strongly pressed upon us that under section 141 of the Code of Civil Procedure, the addition of the proposed issue here was an amendment of the record, which the Court was bound to make, upon the ground *that it was necessary for determining the real question or controversy between the parties.*

The power of amending issues, which is given to the Courts of this country by section 141 of the Code, is almost in the same language as the power of amendment given to Judges in England by the 222nd section of the common law Procedure Act, 1852; and it has been held here, as well as in the English Courts, that a Judge is not bound to make such amendments, except for the purpose of more effectually putting in issue and trying the real question or questions in controversy, as *disclosed by the pleadings on either side,* (see *Bizjie Bibi* vs. *Monohur Doss,* 2 Ind. Jur. N. S., 118) and in England (See *Wilkin* vs. *Reed,* 15 C. B., 192; *Lucas* vs. *Tarleton,* 3 H. and N., 116.)

The pleadings here consist of the plaint and written statements, and unless a Judge can see that the issue proposed to be added or amended will raise some point which is disclosed by the plaintiff's pleading on the one hand, or by the defendant's on the other, he is clearly not bound under the obligatory words of the latter part of the section to allow the amendment.

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NEHORA ROY v. RAJAH RADHA PERSHAD SINGH.

Judgment.

GARTH, *C.J.*

It is true that in some cases the Courts, in the exercise of their discretion, have been allowed under special circumstances to go beyond this line; and when no injustice would be done to either party to allow issues to be raised upon matter which does not strictly come within the proper scope of the pleadings, but then the amendment must be made under the first part of the section, which apparently gives a discretion to the Judge, and not under the obligatory words of the latter portion of the section.

Now in this case, it is quite clear that the point sought to be raised by the plaintiffs in the proposed issue was never suggested in the plaint, and that it never occurred to the plaintiffs till after the issues had been fixed for trial, and until they had heard of the decision of the Court of Ghazeepore.

It was an entirely new issue upon an entirely new point, and if it could be raised at all, the case was clearly one of those in which it was for the Judge, in his discretion, to allow the amendment or not.

Then, considering that for ten years past the appellants had been submitting to the jurisdiction of the Shahabad Court, and taking part in carrying out the execution proceedings there; considering also that when they appealed the case to the High Court in 1874 they never thought of raising this question of jurisdiction; considering also that in the present suit they never thought of raising this issue until they had heard the opinion which had been expressed by the Judge of Ghazeepore, we think that the Judge acted very rightly, after this long series of litigation, in not allowing the plaintiffs, at that stage of the case, to raise a point which after all was foreign to the merits.

We are now asked on appeal to say that the Judge has exercised his discretion improperly, and to allow the plaintiffs to raise this issue. We are clearly of opinion that, if we have a right to interfere at all with the exercise of the Judge's discretion, we ought certainly not to do so in this instance, and the more so, perhaps, because we are now informed that the Allahabad High Court has reversed the decision of the Judge of Ghazeepore. We think it perfectly clear that, upon the issues already raised, it was not open to the plaintiffs to raise the question of jurisdiction. The appeal is dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

1879 *April* 10*th*.

No. 636 of 1878

NANAK CHAND AND ANOTHER . (PLAINTIFFS) APPELLANTS;

AND

GOSSAIN LUCHMEE NARAIN PUREE AND OTHERS . . . . . (DEFENDANTS) } RESPONDENTS.

Possession, Suit for—Priority of Mortgages of same Property—Possession, Right to present—Effect of prior sale in execution where there are two decrees on mortgages of same property.

Where a suit for possession of certain property was brought against the defendants who had been let into possession of certain lands as purchasers of the right, title and interest of the mortgagor, at a sale in execution of decree upon a mortgage of that property, by the plaintiffs who had also obtained a decree but subsequently to that of defendants, upon a mortgage of the same property, executed on the same day as the defendants' mortgage, and at a sale in execution of such decree, had purchased the right and interest of the mortgagor, it was *held* that the defendants, under their purchase, were entitled to the present right of possession, and that the plaintiffs could not, in a suit for possession only, raise the question as to whose mortgage was prior in point of time.

Per GARTH, *C J.*—The right to the possession of the property cannot depend upon which of the mortgages was first.

APPEAL from a decision passed by the Subordinate Judge of Gya, reversing the decree of the Second Sudder Moonsiff of that district.

The plaintiffs Nanak Chand and Mussamut Gelo Bibee in this case sued for possession of a one-third of a 5-annas 4-pie share of the entire Mouzah Bhundagur, on the basis of a sale certificate, dated 16th June 1875, and a kobala, dated 22nd March 1877, executed by one Kesho Lall, in favour of the second plaintiff.

It seems, from the documentary evidence filed by the parties, that one Jhem Narain executed two mortgages on the same day, the 2nd July 1868, of the same property to different people, in consideration of loans advanced by them—the one in favour of one Luchmun Lall and the other in favour of Nanak Chand and Kesho Lall.

On the 7th January 1869 Luchman Lall obtained a decree upon his mortgage for the sale of the mortgaged property, and on the 13th February of the same year attached the property in execution of his decree. The property was sold in execution, and at the sale on the 28th June 1869 was purchased by Jamiat Lall, and an order, dated 14th September following, was issued for possession to be given to the purchaser.

Nanak Chand and Kesho Lall also sued upon their mortgage, and, on the 29th March 1869, obtained a decree for the sale of the same property. At the sale in execution of their decree they purchased the right and interest of their debtor on the 24th September 1874. On the 16th June 1875 an order was made for possession to be delivered up to them. It may be observed that the first execution sale was subsequent to the decree obtained by Nanak Chand and Kesho Lall. By a kobala, dated 2nd March 1877, the latter transferred his right under the purchase of 24th September 1874 to Mussamut Gelo Bibi, the second plaintiff.

Jamiat Lall having died, his widow Mussamut Teluckdye was made a party to the suit. Gossain Luchmee Narain Puree, who was not originally a party to the suit, filed a written statement, claiming to have purchased the property at the first sale through Jamiat Lall, and to have been put in possession as such purchaser.

The Subordinate Judge decided that the claim of the defendant Gossain Luchmee Narain Puree to possession was preferable to that of the plaintiffs, on the ground that the purchase made by him took place first, and dismissed the suit without having made any enquiry as to which of the mortgages, in respect of which the decrees were made, was executed first.

The plaintiffs thereupon appealed to the High Court, on the grounds, *inter alia*, that priority of attachment and sale under the circumstances conferred on the defendant Gossain no right of possession as against the plaintiffs, and that the defendants had purchased with notice of the first plaintiff's mortgage.

Moonshee *Mahomed Yusoof*, for Appellants.

Baboo *Chunder Madhub Ghose*, for Respondents.

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Judgment.

GARTH, *C.J.*

The judgment of the High Court (1) was as follows :—

GARTH, *C.J.* (PRINSEP, *J.*, concurring):—

In this case both the plaintiffs and the defendants appear to have taken mortgage bonds from the same person, pledging the same property on the same day. Both subsequently obtained decree upon those bonds against the mortgagor.

The defendants, it is found by the Court below, got their decree first, and under that decree they bought the right, title, and interest of the mortgagor, and obtained possession of it.

The plaintiffs afterwards, under their decree, put up for sale and bought the right, title, and interest of the mortgagor, and they now bring this suit for the purpose of recovering the possession of the property from the defendants.

This suit being, therefore, only for possession on the strength of that purchase, the question is, whether the plaintiffs can prove a better right to such possession than the defendants.

The Subordinate Judge has decided that the defendants' right is preferable, because their purchase of the mortgagor's interest was prior in date, and he accordingly dismissed the plaintiffs' suit.

It is now contended, on appeal, that both the lower Courts should have tried, not only the question whose purchase was first, but also whose mortgage was first. But that question, we think, does not arise in this suit. The right to the possession of the property cannot depend upon which of the mortgages was first.

The defendants, when they purchased the interest of the mortgagor, obtained the present right to possession, although in equity they might only have acquired it as trustees for the mortgagor and subject to his right to redeem the property (see *S. M. Kamini Debi* vs. *Ram Lochun Sircar*, 5 B. L. R., 451 ; *Brojonath Kundu Chowdhry* vs. *S. M. Gobindo Moye Dassee*, 4 B. L. R. O. C., 83).

The plaintiffs may, if they please, raise the question of the priority of their mortgage in a suit properly framed for the purpose, but in this suit that question has not been, and could not properly have been, tried.

The appeal must be dismissed with costs.

(1) GARTH, *C.J.*, and PRINSEP, *J.*

[CIVIL APPELLATE JURISDICTION.]

NUNDO KISHORE LALL (PLAINTIFF) . . APPELLANT;

AND

MUSSAMUT RAM SOOKHA KOOER (DEFENDANT) . . . . . RESPONDENT.

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May 5th.

No. 744 of 1878.

Limitation Act, IX of 1871, *section* 20—*Acknowledgment of debt in an unregistered document—Evidence—Alteration in document.*

The defendant on the 11th April 1875 entered into an agreement to pay off a debt due upon a registered bond, dated February 3rd, 1865, by a sale under a kobala of certain property. The kobala contained a clear acknowledgment of the debt, but on its being presented for registration, it was found that the original date, which was admitted by defendant, had been altered to the 11th August, and that the document, on that account, could not be registered. The transaction having fallen through for want of registration, the plaintiff sued upon the bond. The defendant pleaded the debt was barred as having been brought more than six years after the date of the bond.

Held, that the document, although inadmissible in evidence in respect of the property covered by it, was admissible as evidence of an acknowledgment on the 11th April 1875 of the debt to the plaintiff, and that under Act IX of 1871, section 20, the suit was not barred by limitation.

APPEAL from a decision passed by the Second Subordinate Judge of Tirhoot, reversing the decree of the Moonsiff of Tajpore.

Baboo *Chunder Madhub Ghose*, for the Appellant.

Baboo *Hem Chunder Bannerjee*, for the Respondent.

The facts are sufficiently set out in the judgment of the High Court, (1) which was as follows:—

This suit is brought for the recovery of money due under a registered bond, dated the 3rd February 1868, executed by the husband of the defendant in favor of the plaintiff. The stipulated date of repayment was the 25th May 1869. The present suit was brought on the 21st November 1876. The principal

(1) MITTER and TOTTENHAM, *J.J.*

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Judgment.

objection taken by the defendant is, that the claim is barred by limitation, and it is apparently so barred because the suit has not been brought within six years from the 25th May 1869. But the plaintiff's contention in the Courts below was that the claim was not barred under the provisions of section 20 of Act IX of 1871, which governs the present suit.

It has been alleged that in the year 1875 there was an agreement between the plaintiff and the defendant's husband to pay off the debt due under this bond, by the sale of certain property belonging to the debtor, to the creditor, and that the terms of this agreement were reduced to writing, and a kobala was executed by the defendant's husband in favor of the plaintiff. It is admitted that this kobala was written some time in the year 1875. The plaintiff's contention was, that in this kobala there was a clear acknowledgment on the part of the debtor of his liability under the bond, and that as this acknowledgment was within six years from the date of the suit, the claim was not barred under the provisions of the section aforesaid.

It appears that this alleged deed of sale, in which the acknowledgment in question is contained, was presented for registration. The defendant's husband admitted the document as having been executed by him before the Registrar, but he alleged that the date which the document originally bore was the 11th April which had been altered to the 11th August, and the only question before the Registrar was, whether it was so altered or not. Because if the document was really dated the 11th April 1875, under the Registration Law it was not admissible to registration, it having being filed before the Registrar after the expiration of the time prescribed by that law. The Registrar decided that question in favor of the husband of the defendant, and committed the plaintiff to the Criminal Court on a charge of having altered the document in question. The plaintiff was convicted and punished by the Session's Court. Under these circumstances the question we have to decide is, whether the plaintiff's claim is barred by limitation.

The Moonsiff was of opinion that under section 20 of the Limitation Act of 1871 the claim was not barred, because in the deed of sale, executed by the defendant's husband in favor of the

plaintiff, which transaction afterwards fell through for want of registration, the defendant's husband distinctly acknowledged that he was liable for the amount due under the bond, and that acknowledgment being within six years from the date of suit the Moonsiff over-ruled the plea of limitation.

On appeal the Subordinate Judge is of opinion that the alleged deed of sale upon which the plaintiff relies as containing an acknowledgment by the defendant's husband of his liability under the bond, having been altered in respect of its date, and the plaintiff having been punished by the Criminal Court for the alteration, he is not entitled to take any advantage of that document, and that therefore he cannot rely upon it in order to remove the plea in bar which has been set up against him. The Subordinate Judge is further of opinion that, under the circumstances set forth above, that document is not admissible in evidence. He has accordingly decreed the appeal of the defendant and dismissed the plaintiff's suit.

We are of opinion that the view taken by the Subordinate Judge is erroneous. Although the document is not admissible as evidence in respect of any question relating to the property covered by it, still it may be good evidence between the parties for any other purpose. And the fact that there was an alteration in the date of the document amounting to forgery, would not make it wholly inadmissible evidence. We are, therefore, of opinion that the grounds upon which the lower Appellate Court has refused to look into this document are not tenable.

But the learned pleader, who appears before us for the respondent, has relied upon some other grounds to support the decree of the lower Appellate Court. He contends that, even admitting this document as evidence, it has not the effect of saving the plaintiff's claim from being barred by limitation. The pleader for the respondent urges that the document does not contain an unqualified admission of the debtor's liability as a subsisting liability; but that on the contrary it declares the liability to be discharged by the sale of the property covered by the kobala. We have had that document read to us, and we think that there is clearly an unqualified admission of this nature, although, no doubt, the document goes on to provide that the liability of the

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debtor would be discharged by the money due under the bond being set off against the consideration. We do not think, therefore, that there is any force in this contention.

It has been further pressed upon us that, if that document is to be treated as evidence, and is to be used as containing an admission against the defendant, the whole of the admission must be taken together, and that the whole of the admission if taken together would show that the money due under the bond had been paid off. We are also of opinion that this contention cannot succeed. The document shows that the arrangement between the parties was, that the debtor would sell a particular property to the creditor, and that the money due under the bond would be set off against the consideration money, but it is quite clear that if that contract was not ultimately carried out, the money due under the bond would be still due to the plaintiff. In support of his contention the learned pleader further relies upon the provisions of section 62 of the Contract Act. That section says: "If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed." The question is, whether a new contract was substituted for the bond of the 3rd February 1868. It has been said that the kobala, although not registered, was a complete contract by itself, and its effect was to satisfy the debt due under the bond. Having regard to the provisions of section 49 of the Registration Act of 1871 (the kobala in question having been executed when that Act was in force), we do not think that there is any force in this contention. That section says that no document required by section 17 to be registered shall affect any immovable property comprised therein, unless it has been registered in accordance with the provisions of this Act. It is, therefore, clear that, unless registration was effected, the title to the property which was agreed to be sold would not pass. That being so, it is clear that the deed of sale for want of registration remained inoperative.

Then the only other contention raised before us is, that the admission or acknowledgment of subsisting liability contained in the deed of sale in question cannot avail the plaintiff, because in its present condition it bears no date. The learned pleader has

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Judgment.

further urged that, if the document had been originally undated, under clause (c) of section 20, oral evidence might have been given of the time when it was signed; but it is admitted that the document was dated, therefore it cannot come within clause (c). We are unable to understand upon what ground it has been contended that the document in question bears no date, when it was admitted by the defendant's husband before the Registrar that the date which it originally bore was the 11th April 1875.

For these reasons we are of opinion that the judgment of the Moonsiff upon the point of limitation is correct, and that the plaintiff's claim is not barred.

Referring to the petition of appeal before the lower Appellate Court we do not find that there was any other substantial question raised by the defendant before that Court. It is, therefore, unnecessary to remand this case. The decree of the lower Appellate Court is accordingly reversed, and that of the Moonsiff restored with costs.

[ORIGINAL CIVIL JURISDICTION.]

1879 *May 8th.*

BIBEE SOLOMAN, BY HER NEXT FRIEND SYUD AHMED . . . . . } PLAINTIFF;

AND

ABDOOL AZIZ AND OTHERS . . . . . DEFENDANTS.

Suit to set aside a decree of High Court—Leave to sue whether necessary—Letters Patent, cl. 12*—Description of place of abode of plaintiff and defendant—Verification of plaint—Act X of* 1877, *sections* 50, 51, 52.

It is not necessary to obtain the leave of the High Court under cl. 12 of the Letters Patent, to sue to set aside a decree of that Court made upon a compromise to which the plaintiff has been induced by the misrepresentations of the defendant to agree, even when it appears from the plaint that the defendants are outside the jurisdiction of the Court.

To describe the plaintiff as residing in Chitpore Road in the Town of Calcutta is not a sufficient description, under section 50 of the Civil Procedure Code, of his place of abode; nor is it sufficient under that section to describe the defendant as formerly of Calcutta without alleging that the plaintiff has been unable to ascertain his place of residence more definitely.

Where the plaint alleges matter which cannot be personally known to the person making the verification, and which is not stated to be an information and belief, a verification which does not distinguish how much is true to the knowledge of the person making it, and what is alleged to be true on information and belief, does not fulfil the requirements of section 52.

THIS was an application on behalf of the defendants to have the plaint in the suit taken off the file, on the ground that it did not comply with the provisions of sections 50, 51 and 52 of the Civil Procedure Code, and on the further ground that the Court had no jurisdiction to entertain the suit.

The plaintiff was described as "Bibee Soloman, an infant, under the age of 18 years, residing at Chitpore Road, in Calcutta, by Syud Ahmed of the same place, her next friend, plaintiff," while the defendants were thus described: "Abdool Aziz and Ahmedoolah, both formerly of Colootollah in Calcutta, but Ahme-

doolah at present residing in Cashmere, and Shopa Bibee residing in Cashmere, defendants."

The verification of the plaint was in these terms: "I Syud Ahmed, the husband and next friend of the plaintiff above named, do declare that the matters and facts above set forth are true to my knowledge, except as to matters stated on information and belief, and as to these matters I believe them to be true."

It was alleged in the plaint that on the 21st December 1871, the plaintiff, by and together with her mother Bibee Rubbia, had filed a suit in the High Court against Doorga Churn Law, Bhuggobutty Churn Law, Khajah Sonawallah, Khajah Moheeooddeen (since deceased), Abdool Aziz and Shopa Bibee, claiming to be entitled as one of the heirs of one Akbarjee, deceased, to a 7-24th share of his estate which she alleged was in the hands of the defendants or some or one of them, and praying, *inter alia*, that an account might be taken of what the estate of Akbarjee consisted at the time of his death, and of all moneys belonging thereto which might have come to the hands of the defendants or any of them.

In that suit the plaintiffs alleged that a moiety of the property in the hands of the defendant Moheeooddeen belonged to the estate of Akbarjee. This property Moheeoodeen claimed to be his own under a certain deed of release granted to him by Akbarjee; the estate of the latter, he said, amounted only to Rs. 30,000.

On the 12th April 1876 Moheeoodeen died, and the suit was revived against his executors, Abdool Aziz and Ahmedoolah. The executors in their petition for probate stated the value of Moheeoodeen's estate to be Rs. 4,41,124.

On the faith of this representation, the plaintiffs came to a settlement of her claim with the defendants, and a compromise accordingly was filed in the suit and a decree made thereon on the 11th September 1876.

On the 20th September 1876, however, as the present plaintiffs allege, it was discovered that the sum of two lacs, which ought to have been included, had not been included in the estate of Moheeoodeen. In July 1877 a further sum of Rs. 14,000 was discovered as belonging to the same estate.

This suit was thereupon filed for the purpose of setting aside

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Argument.

the settlement of 11th September 1876, and the decree made thereon.

Woodroffe (for the Defendants).—My application is to have the plaint in this suit taken off the file, on the ground that it does not comply with sections 50, 51 and 52 of the Code of Civil Procedure, and on the further ground of want of jurisdiction.

The name, description and place of abode of neither the plaintiffs nor the defendants are sufficiently definitely shown in the plaint. To describe the plaintiff as residing in Chitpore Road is no description of her place of abode under section 50, nor is it sufficient for the purposes of that section to describe two of the defendants as resident in Cashmere, and the third as formerly of Colootollah, in Calcutta, without alleging that the plaintiff had been unable to ascertain his residence more definitely. From the description of the plaintiff it would appear also that she is suing personally, whereas from the body of the plaint we find she is suing as representative of Bibee Rubbia, her deceased mother.

The plaintiff claims to be entitled to the estate of Akbarjee, not of Moheeooddeen. Now, it is not alleged that any additional property has been discovered as belonging to the estate of Akbarjee.

It was discovered after the compromise of the former suit, that Moheeooddeen, whom she sued in that suit in his representative capacity as executor of Akbarjee, had left more money than she originally thought. That can be no ground for setting aside the decree made in the former suit.

[PONTIFEX, *J.*—For the purposes of this application we must assume the facts stated in the plaint to be true, and therefore, that Moheeooddeen and Akbarjee held their property in moieties.]

Then as to the verification, there is no statement as to what is known to be true to the knowledge of the person making it, and what is alleged to be true on information and belief. The form of the verification is correct, but the plaint itself does not state anything as being alleged upon information and belief, while it is quite clear that matters are stated in the plaint which

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are not and cannot be of personal knowledge. The verification is therefore bad under section 52.

Another objection is, that the plaint is not signed by the plaintiff's attorney as required by section 51.

I now come to the question of jurisdiction. We contend that the plaint does not disclose jurisdiction against all the defendants.

T. A. Apcar.—The proper time to argue this point is on settlement of issues.

[PONTIFEX, *J.*—This question ought to have been raised when the plaint was admitted.]

The case of *Hadjee Ismail* vs. *Hadjee Mahomed*, 13 B. L. R., 91, is on all fours with this case, and there it was held that the plaintiff had no jurisdiction to sue in Calcutta without leave of the Court under clause 12 of the Letters Patent.

[PONTIFEX, *J.*—In what other Court could the plaintiffs here sue to alter or set aside the decree?]

They might sue in this Court if they had obtained leave. All the defendants, so far as they are described, appear to be outside the jurisdiction of the Court, and that being so, it is clear from the decided cases that the leave of the Court must be obtained in the first instance.

T. A. Apcar (for the Plaintiffs) contended that no sufficient grounds had been alleged for taking the plaint off the file. All that was necessary to be done was to return the plaint for amendment.

The following judgment was delivered by

PONTIFEX, *J.*:— PONTIFEX, *J.*

The plaintiff in this case brought a former suit against Mohecooddeen as the executor of one Akbarjee, alleging that all the property in his hands belonged to the defendant and Akbarjee in moieties.

While that suit was pending, Mohecooddeen died, and his executors were made defendants. Subsequently a compromise in the suit was entered into, by which the plaintiff accepted a certain

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sum in lieu of her claims. After the compromise, however, it came out that the estate in Moheeooddeen's hands consisted of considerably larger funds than appeared from the testamentary proceedings which took place before the settlement, and upon the faith of which the compromise was made. The plaintiff, by her next friend, now seeks in this suit to set aside that settlement and the decree thereon, on the allegation that, if she had known that estate in the hands of Moheeooddeen consisted of larger funds than was then represented, she would not have accepted in satisfaction of her claim the amount for which that claim was settled.

The plaint is objected to on several grounds. One ground is, that the plaintiff claims only through Akbarjee, and does not in her plaint sufficiently show how that claim can be affected by the fact of the estate of Moheeooddeen being larger than it was originally supposed to be. I think the third paragraph, though not very clearly drawn, does show that the amount of this estate did affect her claim, for there she alleges that all the property in the hands of Moheeooldeen was held by him jointly in moieties with Akbarjee. She again states this as a fact.

If this statement be true, the plaintiff's claim against Akbarjee would be very considerably increased on the discovery of the other property belonging to the estate of Moheeooddeen.

There are other grounds, the chief of these being that this Court has no jurisdiction to try this suit—at all events without leave.

It seems to me that as the former suit was had in this Court and proceeded to a decree, and as the principal part of the prayer is to set aside that decree, this Court, and this Court alone, has jurisdiction.

I think it is not necessary where the plaintiff seeks to set aside such a decree for leave to be obtained. On this ground the defendant's application fails.

There are, however, other objections of a technical nature which have been correctly taken.

The first is, that the description of the plaintiff as residing at Chitpore Road in Calcutta is not sufficient according to the provisions of section 50 of the Civil Procedure Code.

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The second that the place of abode of the defendants is not described as required by the same section. Two of them are stated to be residing at Cashmere, while the third is described merely as formerly of Colootollah in Calcutta, there being no allegation that the plaintiff has been unable to ascertain his residence.

The third objection is, that the plaint is not subscribed and verified by the plaintiffs, as required by sections 51 and 52.

Upon these points I think the application must succeed.

The plaint must be amended in order to comply with the requirements of the Code.

[CIVIL REFERENCE.]

BEHARI LALL MOOKERJEE . . . . . PLAINTIFF;

AND

MUNGOLA NATH MOOKERJEE . . . . . DEFENDANT.

April 17th.

No. 497 of 1879.

Suit for arrears of rent—Review—Limitation—Act VIII (B.C.) of 1869, section 103—Act XV of 1877, section 12.

While according to section 6 of the Limitation Act, XV of 1877, the period of limitation prescribed by section 103 of Act VIII (B.C.) of 1869, for the application for a review of any judgment or order under the provisions of that Act, remains unaltered, the rules prescribed by the Limitation Act for computing the period of limitation are applicable to rent suits. Accordingly, a party applying for a review of a judgment on appeal in a rent suit would be entitled to the benefit of the rule in section 12 of the Limitation Act, by which the time requisite for obtaining a copy of the judgment shall be excluded in computing the period of limitation.

REFERENCE under section 617 of the Code of Civil Procedure from the District Judge of Hooghly.

The terms of the reference were thus stated by the District Judge :—

My *locum tenens*, Mr. Brett, on the 23rd September, decided an appeal in a rent suit. On the 25th idem, the appellant applied for a copy of the appellate judgment and decree. Owing to the intervention of the Dusserah vacation from the 26th September to the 27th October, both dates included), the copy was not ready for delivery till the 18th November. On the 16th December the

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appellants, with this copy of judgment and decree, presented before me an application for the review of such judgment.

The question is whether this application is in time. Section 103 of Act VIII (B.C.) of 1869 states that no application for a review of any judgment or order passed in any suit brought under the provisions of this Act shall be received by any Court after the expiration of 30 days from the date of such order or judgment. This language is clear; and would seem to require that a review to be in time *must* be put in within the 30 days next after the date of the judgment sought to be reviewed. In an analogous matter in the same Act (section 58), viz., the limitation in respect of execution of certain decrees, it has been held that the term therein mentioned, viz., three years, is absolute, and cannot be extended by operation of the general Limitation Act (6 W. R., Act X. Rul. 84.) So also it has been held (2 C. L. R., 543) that the general limitation law, notwithstanding it makes provision in article 110 of the Rent Schedule for the case of arrears of rent, does not apply to the case of land rent which is exclusively governed in matters of limitation as well as in all else, by the provision of the rent laws.

Had these been the only rulings known to me, I should feel no difficulty in the matter; but a judgment of the High Court, (Special Appeals Nos. 901 and 902 of 1877) not indeed published in any authorized report, but one which, being in a case from this Court, I think I am bound to defer to, has been brought to my notice. I annex a copy of it; it is of still later date than the ruling last above quoted, and it rules that the general Limitation Law does apply to this case of a review under section 103 at least.

The judgment of the High Court (1) upon the reference submitted, was as follows:—

The Judge of Hooghly, in making this reference to the Court, and in observing on the precedents which have been cited before him or brought to his notice, appears not to have remarked the change in the law introduced by section 6 of the present Limitation Act. The corresponding section of the repealed Act IX of 1871 declared that, "when by any law, not mentioned in the schedule hereto annexed, and now or hereafter to be in force in any part of British India, a period of limitation, differing from that prescribed by this Act, is specially prescribed for any suits, appeals or applications, nothing herein contained shall affect such law," so that when by any special enactment which continued in force, such as the Rent Act, any period of limitation differing from that prescribed by Act IX of 1871 were prescribed, then

(1) JACKSON and MCDONELL, *J.J.*

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the provisions of Act IX were wholly inapplicable to such cases, and therefore the petitioner for review would be bound to present his application precisely within the time specified by the law in question. But section 6 of the present Act is in these terms :— "When by any special or local law, now or hereafter in force in British India, a period of limitation is specially prescribed for any appeal or application, nothing herein contained shall affect or alter the *period so prescribed.*" So that, according to this section, the period prescribed by section 103 of Act VIII (B.C.) of 1869, remains unaltered, but the rules prescribed by the Limitation Act for computing the period of limitation are applicable. Therefore the party applying for review would be entitled to the benefit of the rules contained in section 12 of that Act. At the same time it is not apparent that any useful purpose has been answered by making this reference, because the application is to review the judgment of Mr. Brett, who was the Acting Judge of Hooghly, in the month of September last. The application is made to Mr. Grant in the month of November, and as it will appear from a perusal of the petition which we sent for for that purpose, that the application rests upon supposed errors of judgment, it would seem that section 624 of the Procedure Code would bar the entertainment of the application by any Judge other than the Judge who delivered the judgment.

[ORIGINAL CIVIL JURISDICTION.]

1879 *May 12th.*

BHOYRUB DOSS JOHURRY . . . . . .

AND

DOMAN THAKOOR . . . . . .

Abatement of suit on death of sole plaintiff—Revivor—Civil Procedure Code, sections 363, 365, 366, 371—*Limitation Act* (*XV of* 1877), *Schedule II, Arts.* 171 *and* 178.

Upon the death of a sole plaintiff, unless an application be made within 60 days from the plaintiff's death by the legal representative to have his name substituted upon the record, the suit abates under section 366 of the Code of Civil Procedure. But under section 371 of the Code, and Art. 178 of the Limitation Act (XV of 1877), the Court may revive the suit on the application of the legal representative within three years from the time when the right to apply accrued, if it can be proved that he was prevented by any sufficient cause from continuing the suit.

THE plaint in this suit was filed on the 10th September 1878, in the name of Bhoyrub Doss Johurry, as sole plaintiff. On the 9th of November of the same year, Bhoyrub Doss Johurry died leaving a will. Probate, however, of this will was not obtained until the 5th of April 1879, on account of the necessity of having special citations issued and of difficulties arising from appointment of particular persons as executors.

Bonnerjee, for the executors, obtained a rule *nisi*, calling upon the defendant to show cause why the suit should not be revived in the names of the executors, or why the suit should not abate under section 366 of the Civil Procedure Code, and in the event of an order being made for abatement, such order should not be set aside under section 371, and the names of the executors be entered upon the record.

Cracknall, for the defendants, showed cause.

The first part of the rule, he contended, could not stand, as here there was a sole plaintiff, and no application to revive the suit had been made under section 363 within sixty days from the date of the plaintiff's death—sixty days being the period within which

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such an application must, under the Limitation Act, Schedule II, Art. 171, be made. If the suit abated under section 371, and an application was made under that section to set aside the order of abatement, it was necessary for the applicants to show that due diligence had been exercised. Here the plaintiff died in November 1878, and no application had been made until now. If there were difficulties in the way of obtaining probate, the proper course was to apply for limited administration. Under section 4 of the Limitation Act this application must be dismissed as having been made out of time.

WILSON, *J.* :— WILSON, *J.*

The first question whether I have power to make either of the orders asked for is important. Section 363 of the Code provides that "if there be more plaintiffs than one, and any of them dies, and the cause of action does not survive to the surviving plaintiff or plaintiffs alone, but survives to him or them and the legal representative of the deceased plaintiff jointly, the Court may, on the application of such legal representative, enter his name on the record in place of such deceased plaintiff, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs and such legal representative." Section 365 provides that, "in the case of the death of a sole plaintiff or sole surviving plaintiff, the Court may, where the cause of action survives on the application of the legal representative of the deceased, enter his name in the place of such plaintiff on the record, and the suit shall thereupon proceed." Article 171 of the Limitation Act says the period of limitation for applications under these sections shall be sixty days from the date of the plaintiff's death. The result is, that as to the first part of the present application, which is to revive the suit under section 365, the applicants are barred. Section 366 of the Code provides that, "if no such application (that is no application under section 365) be made to the Court by any person claiming to be the legal representative of the deceased plaintiff, the Court may pass an order that the suit shall abate, and award to the defendant the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff, or the Court may, if it think proper, on the appli-

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cation of the defendant, and upon such terms as to costs, or otherwise as it thinks fit, pass such other order as it thinks fit for bringing in the legal representative of the deceased plaintiff, or for proceeding with the suit in order to a final determination of the matter in dispute, or for both those purposes." When the order is made under the first part of this section the suit abates. Section 371 says that "when a suit abates or is dismissed under the chapter no fresh suit shall be brought in the same cause of action. But the person claiming to be the legal representative of the deceased bankrupt or insolvent plaintiff may apply for an order to set aside the order for abatement or dismissal; and if it can be proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit."

No period of limitation is specifically provided for applications under the last two sections, and the period of limitation, therefore, must come under Art. 178 of the Limitation Act, which gives three years from the time when the right to apply accrues. Under these two sections, there is, I think, power to deal with such cases as the present by declaring the suit abated under section 366, and at the same time reviving it under section 371.

The question then is, whether the applicant was prevented by any sufficient cause from continuing the suit. I think that he was. Mr. Cracknall says sufficient cause was not shown because the applicant might have applied for limited administration, but his omission to apply for such an administration, which might or might not have been granted, was not, I think, such neglect as should disentitle him to relief.

[ORIGINAL CIVIL JURISDICTION.]

OOPROMONIAN SETTY AND OTHERS . . PLAINTIFFS;
AND
. W. HEILGERS AND OTHERS . . . . . DEFENDANTS.

1879
May 19*th*.

No. 627 of 1876.

Charter-party, Construction of—Contract Act, section 230, *cl.* 2—*Evidence Act, section* 92—*Agent, Personal liability of—Undisclosed Principal.*

Under a time Charter-party the plaintiffs chartered a certain vessel from the defendants who were described in the document as "H. & Co., as Agents for, and on behalf of, the owners." The Charter-party, which was signed "H. and Co., Agents for the owners," provided that the ship should be provided "with a proper and sufficient crew of officers seamen, stokers, engineers, firemen and other necessary persons for working cargo with all despatch," and further that "the owners *or* Agents should be held responsible" for certain losses "which might arise to the goods or cargo from the state of the ship's stowage," or from any incapacity or negligence of the crew. The names of the owners of the vessel, though disclosed to the plaintiffs before the making of the Charter-party, did not appear in the document itself. In a suit by the plaintiffs against the defendants to recover a sum paid by them as they alleged, on behalf of the defendants, in providing stevedores for the loading and discharging cargo, it was *held* that under the contract the defendants were not bound to employ stevedores and therefore not liable to pay the sum claimed.

Semble, that clause 2 of section 230 of the Indian Contract Act must be read subject to the provisions of section 92 of the Evidence Act, so that an Agent who appears to be personally liable on the face of a document which does not disclose the name of his principal, cannot escape liability by giving evidence of a disclosure apart from the document, of his principal's name.

THIS was a suit to recover from the defendants the sum of Rs. 4,374-13-3, paid by the plaintiffs, as they alleged, on behalf of the defendants in providing stevedores for the loading and discharging cargo on board of and from the steam ship "Lumley Castle," which had been chartered by the plaintiffs from the defendants under a time Charter-party.

The Charter-party was in the first clause described in terms as having been made between S. R. M. S. Luchmon Setty, and Mahomed Gouse of the first part, and Messrs. F. W. Heilgers

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& Co., "as Agents for, and on behalf of," the owners of the steam ship "Lumley Castle." It stipulated, *inter alia*, that the "Lumley Castle" should be "provided with a proper and sufficient crew of officers, seamen, engineers, stokers, firemen and other necessary persons for working cargo with all despatch," and "should at all times during the said service be fitted and furnished with engines, machinery, masts, yard sails, boats, anchors, cables, cordage, fire engines, and every requisite for keeping the machinery in an effectual working order, and all other stores fit and needful for such steamship for the said service; all of which shall be provided and done at the proper cost and charge of the said owners, and the steamship, so properly equipped, stored and manned, shall receive and take on board her all such persons, troops, stores, cargo, &c., and whatsoever else may be ordered to be put on board, and shall carefully stow and properly dunnage and mat such cargo, and therewith proceed to such ports or places 'as the charterers may order or direct.' Also during the continuance of this Charter-party, in performance of such services, the said master and his crew with his boats shall be aiding and assisting to the best of their power." It was further provided that—

"The owners or agents of the steam-ship should be held responsible to the charterers for any deficiency on quantity, or any loss, damage, misdelivery or over-carriage which may arise to the same goods or cargo from the state of the ship's stowage or from any incapacity, want of skill, insobriety or negligence on the part of master, officers, engineers, stokers, firemen, or crew of the said ship or any of them."

The plaintiffs under the Charter-party took possession of the "Lumley Castle" on the 9th October 1877, and on the same day requested the defendants to provide stevedores for the purpose of loading and stowing certain cargo. This request the defendants refused to comply with, and the plaintiffs were compelled to provide at their own charge such stevedores and other persons as were necessary for the loading, stowage and discharge of cargo, and thereby incurred expenses to the extent of Rs. 4,374-13-3. This amount they now sued to recover, on the ground that under the Charter-party the Agents of the ship were bound to supply stevedores, in order to secure the proper stowage of the cargo.

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The defendants by their written statement denied any liability, alleging that in making the Charter-party they had acted as agents merely, and before the making of the Charter-party had disclosed the names of their principals.

They further denied that under the Charter-party they were bound to supply stevedores, their being a full and sufficient crew on board for all purposes. They stated also that in the case of similar Charter-parties it was not usual to employ stevedores.

The names of the principals, though not appearing on the document itself, were disclosed verbally to the plaintiffs before the Charter-party was made.

Jackson and *Hill*, for the Plaintiffs.

Phillips and *Stokoe*, for the Defendants.

Hill.—There are two main questions to be considered in this case:—1*st*, whether the plaintiffs are entitled under the Charter-party to have the cargo loaded by stevedores; and, 2*ndly*, whether the plaintiffs have a right to look to the agents personally for the due performance of the terms of the contract.

As to the liability of the agents:—Although the defendants profess to act as agents for the owners of the ship, it is clear from the Charter-party itself that they are liable for "any loss, damage, misdelivery or over-carriage, which may arise to the goods or cargo from the state of the ship's stowage, or from any incapacity or want of skill or negligence on the part of the officers or crew." The words used are "agents *or* owners." This clause shows in what capacity the defendants contracted.

We contend that under this Charter-party we are entitled to have security for the proper stowage of the cargo, and that, if in order to secure such proper stowage we are justified in employing stevedores, we should be entitled to charge the defendants for the expenses occasioned thereby.

The defendants may seek to rely on the covenant that the ship "shall be provided with a proper and sufficient crew of officers, seamen, engineers, stokers, firemen and other necessary persons for working cargo, with all despatch," for undoubtedly the

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word 'crew' may be taken here as including the several persons following. I submit, however, that the latter part of the sentence ought to run thus: "and *with* other necessary persons for working cargo with all despatch."

Argument.

The words "all despatch" must be construed with reference to the port of Calcutta, where it is the custom to employ stevedores, and where cargo could not be loaded or discharged without stevedores. Then it is stipulated that "in the performance of such services, the master and crew, with his boats, shall be aiding and assisting." In services of navigation and of receiving and delivering cargo, the master and crew must, apart from any agreement, assist, so that these words may be taken to refer to other assistance to be rendered, and they are wide enough to mean the assistance to be rendered to stevedores or other persons skilled in the stowing of cargo.

[WILSON, *J.*—Your case really rests on the construction to be placed on the words with "all despatch."]

We say we are entitled under these words to have the ship loaded properly with all proper despatch, and that in order to secure proper stowage, we are entitled to employ skilled labour. The Charter-party does not exclude this right, and further, as I have said, it is customary in the port of Calcutta for stevedores to be employed in cases of the sort. When, therefore, the agents undertook to load the vessel, they must be considered to have undertaken to do so according to the usual custom of the port. The vessel could not have been properly loaded with all despatch without the employment of stevedores.

With regard to the employment of stevedores, WILLES, *J.*, in the case of *Murray* vs. *Currie*, L. R., 6 C. P., 26, says: "The employment of stevedores has grown out of the duty of the owner to load and unload the ship. This duty used formerly to be executed by the crew, but in dealing with large cargoes the exigencies of modern commerce have created a necessity for the employment of persons skilled in the particular work of stowing cargo."

In *Blackie* vs. *Stambridge*, 23 L. J. Exch. 894, similar remarks by the same Judge are to be found. That, however, was a case where it was ageeed that stevedores employed by the charterers were to be paid by the master or owner of the ship.

As to question of whether the defendants are themselves liable on the contract: In *Paice vs. Walker*, L. R. 1 Exch., 173, it was laid down that a person signing a contract in his own name without qualification is not exempted from liability on the contract by merely describing himself as agent for a named principal. That case, no doubt, has been commented on with disapproval in *Gadd vs. Houghton*, L. R. 1 Exch. D., 357, but until it is overruled, I am entitled to rely upon it as an authority for my contention.

The principals are not subject to the jurisdiction of the Courts here, and cannot be sued. The presumption that the agents are personally liable, therefore, under the third clause of section 230 of the Contract Act, arises—*Humphry* vs. *Dale*, 7 E. and B. 266; *Fleet* vs. *Murton*, L. R., 7 Q. B., 126. See also *Lennard* vs. *Robinson*, 5 E. and B., 125; and *Parker* vs. *Winlow*, 7 E. and B., 942.

I further contend that according to the English authorities there has been no disclosure of the names of the principals, no disclosure, that is, on the face of the contract itself.

The defendants have signed the contract thus:—"F. W. Heilgers & Co., Agents, for the owners of the 'Lumley Castle.'" I say the word "agents" is merely description. In *Gadd* vs. *Houghton* the words used were "on account of," and there is no doubt these words are much stronger than the words used either here or in the case of *Paice* vs. *Walker*.

The case of *Southwell* vs. *Bowditch*, L. R., 1 C. P., 374, was originally decided upon the authority of *Humphry* vs. *Dale* and *Fleet* vs. *Murton*, but on appeal was upset. There, however, was nothing on the face of the contract to make the agent as well as the principal liable. See *Hutchinson* vs. *Tatham*, L. R., 8 C. P., 482.

In *Calder* vs. *Dobell*, L. R., 6 C. P., 486, the agent was expressly requested to disclose his principals, his own credit not being considered sufficient to enable him to obtain credit on his sole responsibility, and there the Court thought there might well be a double liability. Here each party intended to make himself liable.

Phillips (for the Defendants.)

The usage of the port of Calcutta is here immaterial and not

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Argument.

admissible in evidence. By the Charter-party it is the crew that is provided for the purpose of working the cargo with all despatch; it is the crew that is to receive and take on board the cargo. Further, it is the crew that is to be aiding and assisting in everything which has to be done by the charterers.

The words "with all despatch" must mean with all reasonable despatch. They cannot be taken as used with reference to any particular port for this is a time charter.

The object of the Charter-party is merely to hand over the ship in full and proper working order, and the owners or agents are not bound to provide for any labour outside the ship. There is nothing to show that any one but the crew is to stow the cargo. If it had been intended to compel the ship to use some exceptional means for stowing in any particular port to which the vessel might go, it would have been expressly mentioned in the Charter-party.

As to the question of agency, we must look to the language of contract. The defendants are described as "F. W. Heilgers & Co., as agents for and on behalf of the owners." They are afterwards referred to as "the said agents." They also sign as "agents for the owners." They are sufficiently clearly described to come within the case of *Gadd* vs. *Houghton*.

The other side do not venture to contend that the defendants, in the first part of the Charter-party, have covenanted for themselves. They do so contend as to the later clause in which the "owners *or* agents" of the said ship covenant to be held responsible for certain losses.

Even if it should be held that the defendants are personally liable upon this particular covenant, that is no reason for making them liable upon the other covenants where they covenant merely as agents. Again it is the owners who are to have the power to withdraw the ship for breach of contract.

In the recital of the parties to the contract, the defendants are described as agents for and on behalf of the owners, "and they must be taken as contracting throughout in that capacity. Wherever, therefore, the word "agents" occurs, we must take it to mean "agents for and on behalf of the owners."

It cannot be said that the agents show any intention to bind themselves, nor is there any consideration for their so binding themselves.

There is no presumption that the Contract Act, in treating of the subject of undisclosed principals, meant to embody the English Law of Contract.

[WILSON, *J.*—There is a class of cases where you may look to English law for guidance, namely, where words and phrases of technical signification in English law are used in contracts here just as we are entitled to go back to the Hindu authorities where in Indian enactments we find Hindu phrases used.]

In England it was necessary for persons describing themselves as agents, expressly to exclude personal liability. Great hardship might often arise from that rule of construction. Here, however, the Contract Act remedies the evil, and provides that the opposite presumption shall be made where a contracting party describes himself as agent. The English rule will be found in *Lindus* vs. *Melrose*, 3 H. and N., 177.

In *Calder* vs. *Dobell*, L. R., 6 C. P., 486, the question was whether the plaintiffs, after suing the principals and failing to obtain satisfaction, could bring another suit against the agent, through whom the contract was made, and it was held that he could, but then the circumstances were special.

Fleet vs. *Murton*, L. R., 7 Q. B., 126, was a case decided upon usage. It is a case in my favour. But this last case shows clearly that it is not necessary to name the principals in the contract.

In *Gadd* vs. *Houghton*, L. R., 1 Exch. D., 359, JAMES, *L.J.*, says: "Whatever the decision was in the case of *Paice* vs. *Walker*, upon the words "as agents" the words in the present case "on account of" are not at all ambiguous, and it would be impossible to make them words of description." Here the words "for and on behalf of" are almost identical in meaning with those used in the case cited.

In the case of *Lennard* vs. *Robinson*, 5 E. and B., 125, cited on the other side, the principals were foreigners, and on the authority of *Gadd* vs. *Houghton*, where the principals were also foreigners, the words "as agents" should have been sufficient to have discharged the defendants.

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Judgment.

WILSON, *J.*

The following judgment was delivered by

WILSON, *J.*:—

I think the defendants are entitled to judgment in this case, and on several grounds. The first ground of defence taken by Mr. Phillips is, that the defendants are not themselves liable as parties to the contract, but that if any one is liable, it is their principals. I think he is right. The liability depends on section 230 of the Indian Contract Act. The first part of that section says: "In the absence of any contract to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them." The present contract is one in terms made by Messrs. Heilgers and Company, "as agents for, and on behalf of, the owners of the steam ship "Lumley Castle." It is signed "F. W. Heilgers and Company, agents for owners of steam ship 'Lumley Castle.'" It follows (if the case be governed by this first part of the section) that they are not bound unless the terms of the contract are such as to show that they meant to bind themselves personally. I find nothing to that effect in the contract. On the contrary I think an intention not to bind themselves is plainly shown by the clearness with which the true parties to the contract are expressed. There are only two clauses in the contract which can be thought to point the other way. It is said, "the said agents covenant and agree with the charterers in the manner following." I think that means that they covenant as agents for, and on behalf of, their principals. The other clause is the later one which says that the master shall be responsible in certain instances, and again that the "owners *or* agents" shall be responsible for the consequences of certain kinds of negligence. I think the meaning is, that the owners contract that the master shall do certain things. And the owners contract that they or their agents shall make good certain losses.

But it is necessary also to look at the second part of the section. It says, "such a contract (that is a contract by the agent personally) shall be presumed to exist" where any one of their specified conditions exist. I think that means that such a contract

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shall be presumed to exist *unless the contrary appears*. That seems to me the natural meaning of the words. And further it is legitimate here to refer to the Indian Evidence Act, an Act passed in the same year as the Contract Act, and an Act having specially to do with presumptions. Section 4 says, "whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved." We may, I think, properly apply the same construction to the section of the Contract Act, and presume the agent to be personally liable in any of the specified cases, unless an intention to the contrary is shown. Now one of the specified cases is, "Where the agent does not disclose the name of his principal." Two meanings have been proposed for those words. Mr. Hill says they mean (in the case of a written contract) where the name of the principal is not disclosed on the face of the contract. Mr. Phillips says that any disclosure is sufficient. I am inclined to think Mr. Hill's view is right, though it is not necessary, for the reasons I shall state to decide the point." But I am inclined to think that these words must be read subject to the provisions of section 92 of the Evidence Act, and that if, on the face of a written contract, an agent appears to be personally liable, he could not escape liability by evidence of any disclosure of his principal's name apart from the document; still if this be so—if this is a contract on behalf of an undisclosed principal, so as to bring the case within the second clause of the section, I think the defendants are nevertheless secured against personal liability, because the *primâ facie* presumption of an intention to contract personally is rebutted by the language of the contract itself.

If Mr. Phillips' contention be right, and the disclosure of the principal may, to satisfy the section, be in the document or outside, then the matter is clear; the agent did disclose the names of their principals at the time of the contract, and the case falls under the first, not the second, clause of the section. Upon any view I think the defendants are entitled to have the suit dismissed on the ground that the contract is not personally binding upon them. They are also entitled, in my opinion, to have the suit dismissed, on the ground that the claim is not one which

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the plaintiff is entitled to make under the contract; the complaint is that the defendants refused to employ stevedores to load and unload the ship, and insisted on unloading by captain and crew, and it is plain from the evidence that was the real controversy from first to last. The captain said I and my crew are entitled to load and unload. The plaintiff said, No! your crew is short, or you are not loading with proper despatch, but you are bound to place the loading and unloading in the hands of independent stevedores, for that is the method of loading in ordinary use in Calcutta and Bombay.

Now, it is matter of common knowledge that two methods of loading and unloading are in use—by the crew and by stevedores—and people may contract for either way.

The Charter-party is a time charter to commence on arrival at Calcutta, and to terminate at the end of five months; but in the interim the steamer may ply to and from any ports the charterers please. They may send her on any number of voyages; they may carry what freight they like, passengers, pilgrims and troops who can walk on board, or cargo in bags, which is easy to load, or cargo in bulk, which is troublesome. The voyages then being unlimited in number both as to place and as to the kind of cargo to be carried, it seems unlikely that the owners would put themselves entirely in the power of the charterers, by binding themselves to load and unload any kind of cargo any number of times according to the usages of any number of unknown ports, and accordingly the matter is specifically dealt with by a clause in the Charter-party. The agents covenant that the steamer shall be provided with a proper and sufficient crew of officers, seamen, engineers, stokers, firemen and other necessary persons for working cargo with all despatch. They expressly contemplate the method of unloading by crew and not by stevedore, and they go on to say the steam ship shall receive and take on board her all such persons, troops, invalids, passengers, pilgrims, horse, cattle stores, provisions, cargo, specie, bullion, treasure and whatever else may be ordered to be put on board, and shall carefully stow and properly dunnage and [illegible] such cargo, &c., and goes on to make provision that in the performance of all such services the master and his crew, with

his boats, shall be aiding and assisting to the utmost of their power. They are to provide not stevedores but crew for loading. The loading is to be with all despatch, that means, I think, all despatch consistent with the method of loading contemplated, and this view is comfirmed by a later clause, which provides that the owners or agents shall be liable for loss, &c., which may arise from any incapacity, want of skill, insobriety or negligence, not of stevedores, but on the part of the master, officers, engineers, stokers, firemen or crew. It seems to me clear for these reasons that the plaintiffs were not entitled to call on those responsible for the ship to unload by stevedores instead of by crew; and that on this ground also this suit cannot be sustained. The suit must be dismissed with costs on scale 2.

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[CIVIL APPELLATE JURISDICTION.]

JUGGERNATH SHAHOO AND OTHERS (JUDGMENT-DEBTORS) . . . . . } APPELLANTS;

AND

JUDOO ROY SINGH AND ANOTHER (DECREE-HOLDERS) . . . . . } RESPONDENTS.

May 2nd.

No. 333 of 1878

Procedure—Execution of Decree of Privy Council—Act X of 1877, section 610—Decree, Copy of.

On the application by the decree-holders for execution of a decree of the Privy Council, a copy of the decision, but not of the decree of the Judicial Committee, was filed. *Held*, that under section 610 of the Civil Procedure Code, (Act X of 1877), the applicants were bound to produce a copy of the formal decree before an order could be granted for execution to proceed.

APPEAL from an order passed by the Subordinate Judge of Tirhoot, dated the 30th November 1878.

An application was made on the 15th August 1878, by Judoo Roy Singh and Laljee Shahoo, the decree-holders, for execution of decree of the Privy Council. The case having been taken up on the 14th November, the judgment-debtors objected that a copy of *farmán*, in the appeal to Her Majesty in Council, had not been produced, and upon that objection an adjournment was granted.

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JUGGERNATH SHAHOO v. JUDOO ROY SINGH.

Judgment.

On the 30th November, a copy of the decision of the Judicial Committee was filed, and the Subordinate Judge before whom the application was made, thereupon ordered that proceedings in execution of the decree should be allowed to proceed.

Against this order the judgment-debtors appealed, on the ground that the Court was wrong in directing execution of the decree to proceed on the absence of the decree itself.

Mr. *R. E. Twidale*, for the Appellants.

Baboo *Hem Chunder Banerjee*, and Baboo *Pran Nath Pundit*, for the Respondents.

The following judgments were delivered by the Court (1):—

AINSLIE, *J.*

AINSLIE, *J.*:—

The final order in the suit, out of which the present case arises, was made by Her Majesty in Council.

Under section 610 of the Civil Procedure Code, the decree-holder was bound to produce a certified copy of the final order when he applied for execution. It is no doubt true, as pointed out by the respondents' pleader, that the formal order of Her Majesty in Council is drawn up in the terms of the recommendation of the Judicial Committee in their judgment, but such recommendations cannot be taken to be the decree or order referred to in section 610.

Before the decree-holder can proceed with the execution of his decree in this case, it will be necessary for him to take steps to obtain a copy of the order of Her Majesty in Council.

As to the costs of this appeal the appellant is not entitled to them.

On a former occasion proceedings taken by the respondent for the purpose of enforcing his claim were stopped on the objection of the appellant, that it was necessary for him to produce a copy of the "*faisulla*" in the appeal to Her Majesty in Council.

The word "*faisulla*" in this country is used as representing the judgment, not the order or decree, and in suits here there are two distinct papers. The Subordinate Judge appears to

(1) AINSLIE and BROUGHTON, *J.J.*

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have understood the word "*faisulla*" to mean the judgment and not the formal order. If it was the intention of the judgment-debtor on the former occasion to claim the production of the formal order of Her Majesty in Council, he should have said so distinctly, and should not have used a word which, to say the least of it, is ambiguous. Apparently the respondent complied with the demand made upon him on that occasion; and he is now met by a further objection that the document which he produced is a note of the grounds of decision, and not such an order as is capable of execution.

We consider ourselves bound to give effect to the objection, because under the words of the Code, the respondent was bound to produce the formal order: but at the same time looking to the mode in which the case has been dealt with by the parties, we think the objection of the judgment-debtor, now put forward, ought to have been distinctly taken on the former occasion.

The order made by the lower Court for allowing execution to proceed must be set aside.

BROUGHTON, *J.*:—

BROUGHTON, *J.*

I entirely concur. The question has been fully discussed in 18 W. R., 175. Section 610 of the Code of Civil Procedure, seems to have been drafted on that case. I also agree that the appellant is not entitled to the costs of this appeal.

[CIVIL APPELLATE JURISDICTION.]

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May 21*st*.

No. 235 of 1877.

KOOMAR RUNJIT SINGH AND ANOTHER . . . . . } (PLAINTIFFS) APPELLANTS;

AND

SCHOENE, KILBURN AND OTHERS . . . . . } (DEFENDANTS,) RESPONDENTS.

Diluvion—Re-formation of lands on old site—Onus of proof—Limitation—Adverse Possession.

Where, in a suit for possession of lands which have re-formed upon the old site after diluviation, the defendant relies upon a Statutory title of twelve years' possession, the plaintiff, in order to succeed, must, according to the rule laid down in the case of *Maharajah Coowur Nétrasur*, 8 M. I. A., 220, prove satisfactorily that the defendant has not been in possession for the period of twelve years next preceding the commencement of his suit.

And, where the evidence is not sufficient to support an affirmative finding that the whole of the lands claimed have re-formed within twelve years preceding the institution of the suit, it is incumbent on the plaintiff to show specifically the portion, if any, which has not so re-formed.

Per JACKSON, *J.*—I am unable myself to see on what principle, or by what means the Court could, of itself, undertake to divide the portion of the land which may have re-formed within twelve years from the larger part which evidently re-formed more than twelve years ago, and had been in the adverse possession of the defendants.

REGULAR APPEAL from a decision of the Subordinate Judge of Moorshedabad.

This suit was instituted on the 29th June 1876, to recover possession of a plot of land consisting nearly 700 bighas, on the ground that it was the re-formed land of the plaintiffs' Jote Bhobani, otherwise known as Jamulmati, which had been diluviated between 1263 and 1270 by the river Bhagirutti.

Some time after 1270, according to the plaintiffs' allegation, the river gradually receded, and the plaintiffs' jote, after having almost entirely disappeared, re-formed on its original site, although it was not fit to be taken possession of until 1273. In 1274 the

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crops sown by the plaintiffs were destroyed by the defendants or some of them.

The defendants, on the other hand, denied that the plaintiffs had, at any time within 12 years from the institution of the suit, exercised rights of possession.

Statement.

From the evidence, oral and documentary, it was shown that at one time the lands of Jamulmati were bounded on the north and south respectively by two channels of the river Bhagirutti, and that Kabilpur, which belonged to the defendants, lay to the north of the northern channel. From 1262 the northern channel began to recede from north and north-west, to the south and south-east, until in 1870, almost the whole of Jamulmati having disappeared, the northern stream joined the southern channel. Meanwhile, the lands washed away from Jamulmati gradually accreted to Kabilpur, the owners of which took possession of each accretion as it was formed.

Evidence was also adduced to show that the southern stream of the river had been the boundary of Kabilpur since 1271.

Under these circumstances, the Subordinate Judge held the plaintiffs' suit to be barred by limitation. "It is probable," he added, "from the evidence in the case that a small portion, say about 200 bighas, as Mr. Smith says of Jamulmati has re-formed on the old site within the last twelve years, but the evidence on the record does not enable me to say which portion of the disputed land has so re-formed within the last twelve years. Without proof of this I cannot lay my fingers on any plot as the one which has re-formed within the last twelve years. Not being able to find the plot which has re-formed on the old site of Jamulmati, I cannot pass judgment for the plaintiffs."

Against this decision the plaintiffs now appealed, among other grounds, on the ground that the Court, while finding that portion of the lands consisting of about 200 bighas had re-formed within the period of limitation, ought not to have dismissed the suit with regard to such portion of the claim.

Baboo *Unnoda Pershad Bannerjee*, for Appellants.

O'Kinealy, Baboo *Jugdanund Mookerjee*, and Baboo *Bipro Doss Mookerjee*, for the Respondents.

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KOOMAR RUNJIT SINGH v. SCHOENE, KILBURN.

Argument.

Baboo Unnodd Prosad Banerjee.—The respondent admits that the land now in dispute is land which has re-formed on our ancient site. Admitting the right to the land to have been in us in 1853, the *onus* is on him to prove his title,—Reg. Appeal 185 of 1877. That case is an authority to show that the lower Court should have given us a decree for whatever lands the defendant could not prove himself to have been in possession of for twelve years (*a*).

[JACKSON, *J.*—As a general proposition the law is clearly the other way. The circumstances of the case to which you refer must have been very peculiar.]

[MCDONELL, *J.*—No doubt the Chief Justice had in view the case where the plaintiff's title to the site has been admitted, and it is proved that the land has re-formed within twelve years.]

At any rate, we should have got a decree for the 200 bighas, which the lower Court found not to have been in the plaintiffs' possession for twelve years.

O' Kinealy.—This is a case of ejectment, and the plaintiff must show a clear title to present possession without the aid of any legal presumptions. It is clear, on the authorities, that he cannot recover, unless he shows, either that the land has re-formed within twelve years, or that we have not been in possession of the lands for twelve years.—*Maharajah Koowar Baboo Nitrasur Singh* vs. *Nund Lall Singh*, 8 Moore, 208, 209, 220; *Radha Prosad Singh* vs. *Collector of Shahabad*, 1 C. L. R., 259; *Luchmee Narain Shah* vs. *Jutadharee Holdar*, 7 W. R., 89; *Luckhee Debia Chowdhrain* vs. *Collector of Mymensingh*, 7 W. R., 231; and this he has not done.

The Court below has misconstrued the evidence regarding the 200 bighas which refer to a portion of the lands of which we are admittedly not in possession. At any rate, their situation cannot be ascertained.

(*a*.) In Regular Appeal 185 of 1877, it was proved by the plaintiffs that a portion of the lands claimed, the title to which was admitted to have been in them before the diluviation, had re-formed at a time within 12 years from he bringing of the suit. Under the circumstances, therefore, the Court (GARTH, *C. J.* and TOTTENHAM, *J.*) considered that it must be presumed that the possession of the plaintiffs had been continuous during the diluviation.—ED.

The following judgment of the Court (1) was delivered by

JACKSON, *J.* :—

The plaintiffs in this suit sought to recover possession of nearly 700 bighas of land, which they alleged to be land re-formed on the site of their ancient estate, called Jote Bhobani, otherwise Jamulmati, and they alleged that diluviation of their estate had taken place between the years 1263 and 1270, and that by the last mentioned year the diluviation had become so complete that nearly all trace of Mouzah Jamulmati had disappeared, the river making its encroachment from a north-westerly and south-easterly direction; that after 1270 the river began to retire gradually, and the land was re-formed, but was unfit for cultivation till the year 1273, when plaintiffs took possession and cultivated the land, but they were dispossessed in 1274 by the defendants, who caused the crops that had been sown to be raised down or otherwise destroyed.

The defendants were numerous, but the main contest in this case is with the owners or lessees of Taruff Kabilpur, the lessees being persons carrying on business under the name and style of "Springfield Son and Nephew," who, it appears, have a silk factory in the neighbourhood.

The question before us is, in fact, a narrow one. I understand the evidence to be such, and the defendants do not really question it, that if the bar of limitation were out of the way, with reference to the decision of the Privy Council in the case of *Lopez* vs. *Muddun Mohun Thakoor*, 13 Moore I. A., 467, the land would undoubtedly belong to the plaintiffs, being a re-formation on the site of their old estate. But the defendants entirely deny the allegations of the plaintiffs in regard to possession. Their case is, that by the gradual recession of the river, the land in dispute was taken possession of by them, as an accretion to the estate of Kabilpur, and that is a state of things which it is extremely probable might be at a time when the principles of the case of *Lopez* were not thoroughly understood in this country, and they say, that at no time, since the re-formation of this land, have the plaintiffs exercised any rights of ownership over this land;

(1) JACKSON and MCDONELL, *JJ.*

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that the land, now in suit, has been re-formed for more than 12 years, and has always been in the possession of the defendants. That, I understood, is the defendants' case.

The Subordinate Judge, with certain reservations, found that the defendants have made out their case. The reservation is this: He was inclined to think—for he does not express a very decided opinion upon the evidence of certain of the witnesses—that a portion of the land which the plaintiffs laid a claim to, about 200 bighas in area, might probably have been a re-formation within 12 years before the commencement of the suit. He could not ascertain either the precise quantity or its precise situation. Therefore he says he is unable to give effect to the opinion which he might have given in that way in favour of the plaintiffs. He, therefore, dismissed the suit altogether.

The appeal of the plaintiffs has been in effect limited to pressing upon us that the plaintiffs were entitled to the benefit of this finding, and that as on one hand there were materials to ascertain where these 200 bighas were situated, and on the other, the Court was in a position to ascertain by the evidence the course which the river had taken, and its gradual recession, it ought to have given plaintiffs a decree for these 200 bighas from the lands most recently formed in accordance with the direction taken by the river as just mentioned.

Now, of course, it may be taken to be settled law that the plaintiffs, but for the bar, would be entitled to recover this land, being clearly a re-formation on the site of their original estate. But I think it is equally clear that that is a title which the persons claiming upon it are bound to set up and bring into Court at the earliest possible opportunity, more especially when the land, which is to be claimed in that way, has been occupied *bonâ fide*, as undoubtedly this land had been, by persons who considered themselves entitled to it under the state of law as it was previously understood. It is quite clear that the plaintiffs have deferred bringing this suit until they were on the verge, if not beyond, the statutable period of 12 years, and there is a decision of the Privy Council, which I have always referred to in such cases, as laying down an extremely wholesome rule. That case is in 8 Moore's Indian Appeal cases, page 199—*Maharajah*

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Koowur Babu Netrasur Singh. Their Lordships say in that case at page 220: "The appellant is seeking to disturb the possession, admitted to have existed for about eleven years, of the defendants who insist on a possession of much longer duration, as a statutory bar to the suit. It clearly lies on him to remove that bar by satisfactory proof that the cause of action accrued to him (for that is the way in which the Regulation puts it) on a dispossession within 12 years next before the commencement of the suit, and, therefore, that he or some person through whom he claims, was in possession during that period. No proof of anterior title, such as would be involved in the decision of the boundary question in his favour, can relieve him from this burden, or shift it upon his adversaries by compelling them to prove the time and manner of dispossession."

Now in one way that was a stronger case, and in the other a weaker case than the present. The Government Pleader who appears for the appellants contends that this precedent is not fairly applicable to a case where, from the nature of the case, proof of possession was difficult, or possession was not capable of being exercised. But the plaintiffs showed very clearly in framing their suit, that they knew how possession could be proved, for they made a case of having exercised possession by alleging in the plaint and calling witnesses to prove that, in the year 1273, they had sowed *khesari* on the land, and the Subordinate Judge is evidently of opinion that proof of that allegation altogether failed.

But there is another point of view in which it appears to me the case before us is stronger than the case in 8 Moore. The defendants in that case, if they were wrong-doers, were wrong-doers in defiance of a distinct finding of a competent Court in favour of the plaintiff, there being a boundary dispute decided in the plaintiff's favour. In the present case there is nothing of the sort. The defendants possessed the land under the *bonâ fide* belief that they were entitled to it. It is clear, therefore, that as regards the greater part of this land, the plaintiffs undoubtedly failed on the ground of limitation.

Then, is there anything in the argument which has been pressed upon us in regard to the 200 bighas? We both of us are

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Judgment.

On the 30th November, a copy of the decision of the Judicial Committee was filed, and the Subordinate Judge before whom the application was made, thereupon ordered that proceedings in execution of the decree should be allowed to proceed.

Against this order the judgment-debtors appealed, on the ground that the Court was wrong in directing execution of the decree to proceed on the absence of the decree itself.

Mr. *R. E. Twidale*, for the Appellants.

Baboo *Hem Chunder Banerjee*, and Baboo *Pran Nath Pundit*, for the Respondents.

The following judgments were delivered by the Court (1) :—

AINSLIE, *J.*

AINSLIE, *J.* :—

The final order in the suit, out of which the present case arises, was made by Her Majesty in Council.

Under section 610 of the Civil Procedure Code, the decree-holder was bound to produce a certified copy of the final order when he applied for execution. It is no doubt true, as pointed out by the respondents' pleader, that the formal order of Her Majesty in Council is drawn up in the terms of the recommendation of the Judicial Committee in their judgment, but such recommendations cannot be taken to be the decree or order referred to in section 610.

Before the decree-holder can proceed with the execution of his decree in this case, it will be necessary for him to take steps to obtain a copy of the order of Her Majesty in Council.

As to the costs of this appeal the appellant is not entitled to them.

On a former occasion proceedings taken by the respondent for the purpose of enforcing his claim were stopped on the objection of the appellant, that it was necessary for him to produce a copy of the "*faisulla*" in the appeal to Her Majesty in Council.

The word "*faisulla*" in this country is used as representing the judgment, not the order or decree, and in suits here there are two distinct papers. The Subordinate Judge appears to

(1) AINSLIE and BROUGHTON, *J.J.*

[CIVIL APPELLATE JURISDICTION.]

RAMA RAI . . . . . (DEFENDANT) APPELLANT;

AND

SRIDHUR PERSHAD NARAIN SAHAI AND OTHERS . . . . . (PLAINTIFFS) RESPONDENTS.

1879
April 7th.

No. 236 of 1878.

Substituted Service—Notice, Substituted service of, when good.

Service of notice upon a defendant, by affixing the same upon the door of his dwelling house, is not sufficient, unless the condition exists which alone renders substituted service good, namely, that the person upon whom it is sought to effect service is keeping out of the way.

Ram Chunder Dutt vs. *Jogesh Chunder Dutt*, 19 W. R., P. C., 356, cited and followed.

APPEAL from a decision passed by the Judge of Zillah Tirhoot.

Baboo *Kali Kishen Sen*, for Appellant.

Baboo *Chunder Madhub Ghose*, for Respondents.

For the purposes of this report the facts are sufficiently set forth in the following judgment of the Court (1), which was delivered by

BIRCH, *J.* :—

BIRCH, *J.*

In this case we think that the objection taken in the first ground of appeal must prevail. The Judge is of opinion that service of notice was duly and properly effected and carried out. He says that the notices having been served upon the defendants in these cases by fixing the same on the doors of their dwelling houses, the service was sufficient. Apparently the Judge's attention was not drawn to the judgment of the Judicial Committee, reported in 19 W. R., 356, which has been followed in other cases by this Court. It is there said: "Their Lordships are of opinion that in cases of substituted service, that is, service substituted for the personal service which the Statute requires, wherever it is practicable, the Courts should take care to be satis-

(1) BIRCH and MITTER, *J.J.*

1879

fied that the condition on which alone substituted service is good, exists, namely, that the person who ought to be served personally is keeping out of the way." In this case there has been no attempt to show that the condition which renders such a mode of service good, existed.

The result is, that the finding of the Judge as to the service of notice being sufficient is wrong in law, and the notice not having been served according to the requirements of the law, the suit must fail. The appeal will be decreed with costs.

[CIVIL APPELLATE JURISDICTION.]

April 25th.

Nos. 29, 30, and 31 of 1879.

MUSSAMUT GOURAH KOOER . . . . APPELLANT;

AND

GUNGADHUR PURSHAD . . . . . RESPONDENT.

Minor—Joint family, (Mitakshara)—Act XL of 1858—Act XXVII of 1860—Certificate to collect debts—Act X of 1877, chap. XXXI—Leave to mother to bring suit for Partition.

The interest of a minor brother in an undivided joint Hindu family governed by Mitakshara law, is not such property as is capable of being taken charge of under a certificate of administration granted under Act XL of 1858.

To enable the mother of such a minor to bring a suit for partition on his behalf, it is not necessary for her to be furnished with a certificate under that Act, nor is it necessary for her to obtain the permission of the Court under chap. XXXI of the Code of Civil Procedure. (Act X of 1877.)

The eldest son, not being a minor, is the proper person to collect the debts due to the deceased father.

Sheo Nundun Singh vs. *Mussamut Ghunsam Koeree*, 21 W. R., 143; and *Mussamut Ajhola Kooeree* vs. *Baboo Digumber Singh*, 23 W. R., 208, cited and followed.

Mussamut Etwari vs. *Ram Narayan Ram*, 4 B. L. R., 171, distinguished.

APPEALS from orders passed by the District Judge of Bhaugulpore.

The facts were these:—One Koonjoo Behary died on the 7th June 1878, leaving him surviving two sons, Gujadhur and Kaney, and his widow Mussamut Gourah Kooer. Gujadhur and

Kaney were step brothers, Kaney being the son of Gourah Kooer. Gujadhur's mother had predeceased her husband. Gujadhur had attained majority before his father's death, but Kaney was still a minor.

These three appeals arise out of three applications made to the lower Courts. Two of these, by Gujadhur and Mussamut Gourah Kooer, respectively, were made for obtaining certificates under Acts XXVII of 1860, to collect the debts due to the estate of the deceased Koonjoo Behary. The third application was made by Gourah Kooer to obtain a certificate under Act XL of 1858 for the administration of her minor son's property.

The District Judge granted to Gujadhur a certificate under Act XXVII of 1860 to collect the debts due to his father's estate, and has rejected both the applications of Mussamut Gourah Kooer.

Evidence was given to show that the family was a joint family governed by Mitakshara law.

Branson, and Baboo *Chunder Madhub Ghose*, for Appellant.

Baboo *Mohesh Chunder Chowdhry*, and Baboo *Tarak Nath Dutt*, for Respondent.

After stating the facts as above, the judgment of the Court (1) proceeded as follows:—

Upon the evidence, it appears to us clear that Koonjoo Behary and his two sons formed a joint Mitakshara Hindu family, and no partition has taken place since the father's death. The two brothers, with the mother, therefore, constitute a joint Hindu family, governed by the Mitakshara law. That being so, the interest of the minor brother in the joint family estate is not property of which one can take charge. This view is supported by two decisions of this Court, reported at pp. 143 and 206 of 1 B.L.R., 21 and 23 respectively.

It is clear from the provisions of Act XL of 1858, that a certificate for the administration of a minor's property can only be granted, where it is of such a nature that it is capable of being taken charge of.

(1) MITTER and TOTTENHAM, *JJ.*

1879

MUSSAMUT GOURAH KOOER v. GUNGADHUR PURRAD.

Judgment.

The minor in this case not being shown to possess any such property, the District Judge, we think, is right in refusing the application of Mussamut Gourah Kooer under Act XL of 1858.

The learned Counsel, who appeared for her before us, relied upon a decision of this Court, reported in 4 B. L. R., Ap. 71. In this case the question, whether the interest of a member of a joint family governed by the Mitakshara law, in the joint family estate is such property as can be taken charge of by a guardian was not raised. This case seems to have been cited by the District Judge in the judgment which formed the subject of appeal in the decision already referred to as reported at p. 206 of the 23 W. R. We are, therefore, of opinion that the Judge was right in rejecting the appellant's petition to be appointed the administrator of the minor's property. We may observe here that in the view taken by this Court in this case reported in 21 W. R., 143, and now adopted by ourselves, it is not necessary that the appellant should be furnished with a certificate under Act XL of 1858, to enable her to bring a suit for partition on behalf of her minor son, for the effect of our decision is to hold that section 3 of that Act has no application to the minor's undivided share of the family property. We think, too, that the District Judge is mistaken in supposing that even permission of the Court under chapter XXXI of the Code of Procedure to represent the minor in such suit will be necessary. The suit may be brought in the minor's own name, his mother being set out as his next friend. For this no permission is required.

We are also of opinion that the family being joint, the District Judge has properly exercised his discretion in granting the certificate to collect the debts due to the estate of the deceased father, to the eldest son, who is naturally the Kurta of the family.

The result is that all these appeals are dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

IN THE MATTER OF KOMOLA KANT BISWAS AND OTHERS . . . . . APPELLANTS.

1879 *May* 19*th*.

No. 190 of 1879.

Probate—Document partly testamentary, Construction of—Gift, Deed of—Act X of 1865, *section* 3.

If one part of a document is testamentary in its character, it may be presumed that the remainder, if the language is capable of that construction, is also intended to be testamentary. Under such circumstances, where there is nothing inconsistent with the supposition that the arrangements made therein are to take effect from the death of the person executing it, the document ought to be admitted to probate as a will.

APPEAL from an order passed by the Judge of Mymensingh, on the 15th April 1878.

In this case an application was made for admission to probate of an alleged will, executed on the 27th Falgun 1283, by one Ramjoy Biswas, who died on the 13th Srabun 1284.

The document, of which probate was sought, after reciting that the testator was suffering from disease, and alleging the necessity for liquidating his debts and making provisions in connection with his property, proceeded as follows:—"I therefore, of my own accord, in full possession of my senses and intelligence, and from a candid heart, do execute this will on the following conditions, and put on my signature hereto with my own hand:—

1. On my cousin Komola Kant Biswas having promised before this assembly, to release me of my debts by taking the responsibility of paying all debts due by me up to this date . . . . . I, at my own pleasure, make a gift of 5 annas 6½ gundas and 2 krants share of all my properties, moveable and immoveable, ... to the said Komola Kant Biswas, who, on releasing me from my debts, will hold and enjoy the same from generation to generation . . . My heirs, of whatever description they may be, shall have no right and concern to it.

2. I make a gift of 5 annas 6½ gundas and 2 krants share to Chandra Nath Biswas (my uterine brother) who shall also

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Statement.

take the responsibility of my debts, and hold and enjoy possession of the said property from generation to generation.

3. The remaining 5 annas 6½ gundas and 2 krants share of my property, my wife (dhurmputni) Joy Mongola Dasi will own, hold and enjoy possession of till her death. But as no woman can live independently without the protection of others, he who may maintain her . . . and may cause my sradh to be performed by her and my pinda given at Gya, shall have the said property under his management or charge.

4. Gungamoni and Suntomoyi, my two daughters, will inherit in equal shares the 5 annas 6½ gundas and 2 krants share of my wife on her death. . . . .

5. On my dying without a son my spiritual guide will cease to exercise his office of initiation. . . ."

There were other provisions, but these were immaterial for the purposes of this report.

The document was duly signed by Ramjoy Biswas, and attested by fifteen witnesses. Up to the time of his death, Ramjoy continued in possession of the property. The District Judge refused to grant probate of this document, alleging the following reasons:—"The document does not partake entirely of the character of a will. A will is described in section 3, Act X of 1865, as the legal declaration of the intentions of the testator with respect to his property, which *he desires to be carried into effect after his death.* Para. 1 contains a provision, which is to operate as a deed of gift in the lifetime of the testator. The mere fact that it is coupled with a condition that the testator's heirs shall have no right or title to the said share, does not alter its character.

"It is contended that under section 178 a *gift* may be made in contemplation of death, but this is merely as to *moveable* property.

"It is true that in Para. 1 the testator has combined in his gift a share of both moveable and immoveable property; but if the Court admits the document in respect of the former, it nevertheless remains a deed of gift in respect of the latter, to which the Court cannot grant probate. Thus only partial probate could be granted, and for this there is no provision. The so-called will is on plain paper as usual; but a deed of gift would have required a stamp

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Judgment.

of Rs. 16, and section 74 has no application to this document, as shown by the illustration."

Against the order of the Judge the persons entitled under the instrument appealed to the High Court.

Baboo *Jogesh Chunder Roy*, for the Appellants.

The following judgment of the High Court (1) was delivered by

GARTH, *C.J.* :— GARTH, *C.J.*

We think that in this case the Judge in the Court below has made a mistake.

The question is, whether this document, which is undoubtedly upon the face of it called a will, and which has been dealt with as a will, not only by the persons who made it, but by the attesting witnesses, and which moreover has been executed with all the formalities of a will, ought to be considered as a testamentary disposition, and as such admitted to probate.

The Judge seems to have thought that because one part of it has the appearance of a deed of gift, the whole should be treated as a present conveyance of property, and not as a will.

But when the instrument comes to be examined, we find that at any rate one part of it, viz., the disposition of the one-third share for the benefit of the donor's wife and daughters, is clearly in its nature testamentary. The language is not that of a *present*, but of a *future* gift, and the provision for a trustee to take charge of the property for his wife's benefit, shows plainly that the gift was to take effect after his own death.

Then if one part of the instrument is testamentary in its character, it seems only probable that the rest, if the language is capable of that construction, is intended to be testamentary also; and we find nothing in the earlier parts of the document, which is inconsistent with the supposition, that the arrangements there made were to take effect at Ramjoy's death.

It was very natural that the testator, who evidently did not expect to live very long, and was anxious to leave his wife an estate, if possible, free from all liabilities on account of his debts

(1) GARTH, *C.J.*, and PRINSEP, *J.*

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Judgment.

GARTH, *C.J.*

and managed by some competent person, should have given the two-thirds of his property to his cousin and uterine brother in equal shares in consideration of their undertaking the payment of his debts; and as his cousin was present at the time, it was probable that he should have obtained from him then and there a promise to pay them.

This disposition would probably operate to make his cousin and his brother trustees of the one-third share devised to them respectively for payment of the testator's debts.

But there is no reason to suppose that he meant to transfer the property at once to these relatives. If such had been his intention, there is no reason why the transfer should not have been then made, which it evidently was not. It is very unlikely, that in that case, he and all the persons then present, including his cousin, would have treated the instrument which he was making as a will; and, moreover, we see no reason for supposing that he intended to divest himself from that time of all his property.

The observation made by the appellant's pleader was a very cogent one, that it would have been an extraordinary thing for the testator to have given away the whole of his property in his lifetime, and to have left himself entirely at the mercy of his relations in the future, however long he might afterwards live.

The fact of his retaining possession of his property, and of the instrument in question in his own hands, satisfies us that he had no such intention.

Even if the language of the will were sufficiently equivocal to make it necessary to resort to the oral evidence to see whether the disposition was intended to be testamentary or otherwise, that evidence would entirely remove any doubts which we might entertain upon the subject.

The whole of the witnesses present, including the petitioner, the testator's cousin, fully understood that the instrument was a will, and intended only to operate as such.

We have no hesitation, therefore, in deciding that the Judge in the Court below was wrong, and that the will should now be admitted to probate.

[CRIMINAL APPELLATE JURISDICTION.]

BHOOTNATH DEY AND OTHERS . . . . . APPELLANTS.

1879
June 10th.

No. 244 of 1879.

Assessors—Trial by jury of offences, some of which are triable with the aid of Assessors—Criminal Procedure Code, Act X of 1872, sections 233, Expl. and 263 —Act III of 1877, section 82—Procedure.

In a trial by a jury before a Court of Session upon charges, some of which were triable by a jury, and some with the aid of assessors, the jury, by a majority of four to one, returned a verdict of "not guilty" on all the charges.

Held, that it was not competent to the Judge, who disagreed with the verdict, to treat the trial, so far as it dealt with the latter charges, as a trial with the aid of assessors, and concurring with the minority to convict and sentence the accused persons.

It was the duty of the Judge, in such a case, to have accepted the verdict as one of acquittal, and then to have passed orders in accordance with section 263 of the Code of Criminal Procedure.

Explanation to section 233 of the Code of Criminal Procedure discussed.

CRIMINAL APPEAL from a conviction passed by the Sessions Judge of Hooghly.

The prisoners in this case were committed by the Deputy Magistrate for forgery and for using a forged document as genuine, under sections 467 and 471 of the Indian Penal Code. Further charges were added under section 82 of the Registration Act. Objection were raised in the lower Court against the addition of these charges, on the ground that no one had sanctioned the proceedings, as required by the Registration Act, but that objection was over-ruled.

The trial was conducted before a jury duly chosen by lot.

On the 7th March a majority of four to one returned a verdict of not guilty on all the charges. This verdict the Judge characterised as most perverse, and he thereupon intimated his intention of referring the case to the High Court under section 263 of the Code of Criminal Procedure, and directed the accused to be kept in custody "pending a reference to the High Court."

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BHOOTNATH DEY.

Argument.

On the 10th of March the Judge having meanwhile had his attention drawn to the case of the *Empress* vs. *Mohim Chunder Rai*, I. L. R., 3 Cal., 765, called upon the accused to show cause why they should not be punished under section 82 of the Registration Act, the trial being treated so far as it dealt with the charges under that Act as a trial with the aid of assessors.

No cause was shown, and after several adjournments, the Judge recorded his final judgment, in which, treating the trial on the Registration Act charges as held with the aid of assessors, he concurred with the assessor who was in the minority, and convicted and sentenced all the accused to various periods of imprisonment.

Against this conviction and sentence the prisoners all appealed.

Ghose, for Appellants.

Baboo *Jugdanund Mookerjee* (Junior Government Pleader) for the Crown.

Ghose.—According to the explanation to section 233 of the Criminal Procedure Code, if an offence triable with assessors be tried by a jury, the trial shall not on that ground merely be invalid. The verdict of acquittal, therefore, ought, under section 263, to have been entered, or the Judge, if he disagreed with the verdict, ought to have referred the case to the High Court for orders. The case not having been sent up to the High Court, the verdict must stand, even though the Judge disagreed with it.

The case of the *Empress* vs. *Mohim Chunder Rai*, I. L. R., 3 Cal., 765, is entirely different from the present case. There the prisoners were convicted.

Had the jury in this case convicted the prisoners, I might perhaps on the authority of that case have been allowed to appeal on the facts.

There is no authority for the proposition that a verdict of acquittal may be taken as the finding of assessors.

The Judge here has chosen to consider the trial so far as it deals with the added charges as a trial with the aid of assessors. Now under section 262 of the Code the opinion of each assessor must be given orally and recorded by the Court. The

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BHOOTNATH DEY.

Judgment.

was not done here. Then the jury here was a jury chosen by lot, whereas assessors are not so selected. Throughout the trial was undoubtedly treated as a trial by jury.

This anomaly has happened :—On the same evidence the prisoners have been acquitted on the substantive charges, and convicted by the Judge on the minor added charges.

Baboo Jugdanund Mookerjee.—We have no objection to the trial being treated as a trial by jury, if we can treat the case now as a referred case.

[PRINSEP, *J.*—You cannot do so; for the Judge himself says it is unnecessary to refer the case.]

Baboo Jugdanund Mookerjee.—Having regard to the definition of the word "trial," which in section 3 is stated to mean the proceedings taken in Court after a charge has been drawn up, and to include the punishment of the offender, the trial in this case was not finished until the Judge passed the final order which he made, treating the verdict of the jury as the finding of assessors. That being so the explanation to section 233 does not apply here, and at any time before the end of the trial the Judge had power to treat the case as one tried with assessors.

[MITTER, *J.*—We have only to consider the words "tried by a jury" in the explanation. These words have reference to the time when the jury have discharged their duty by returning their verdict, but the word "trial," following, no doubt, includes the judgment of the Court.]

Ghose, in reply.—So far as the functions of the jury were concerned the trial was at an end when it delivered its verdict. The case was then "tried by a jury" within the meaning of the words used in the explanation to section 233, and it only remained that the Judge should, under section 263, accept the verdict and pass judgment accordingly; or, if he disagreed therewith, refer the matter to the High Court.

The following judgments were delivered by the High Court (1):—

MITTER, *J.* :— MITTER, *J.*

In this case the prisoners were tried in the lower Court for

(1) MITTER and PRINSEP, *J.J.*

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Judgment.

MITTER, J.

the offences described in sections 467 and 471 of the Indian Penal Code, and section 82 of the present Registration Act. The trial was held by jury. On the 7th March 1879 a majority of the jury (four out of five, returned a verdict of "not guilty" under all these sections. The Sessions Judge recorded the following order:—"I cannot agree with the majority. I think it a most perverse verdict. I must refer the case to the High Court." The Judge accordingly directed that all the accused should be kept in "custody pending a reference to the High Court."

The Judge's attention having been subsequently drawn to a case in I. L. R., 3 Cal., 765, he called upon the pleaders of the accused persons on the 10th March 1879 to shew cause why they should not be punished under section 82 of the Registration Act, the trial being considered as having been held with the aid of assessors. It appears that under section 233 of the Criminal Procedure Code, an offence under section 82 of the Registration Act is triable with the aid of assessors. The case was postponed from time to time, and on the 28th March 1879, no cause being shewn, the Sessions Judge recording his judgment treating the trial so far as the charge under section 82 of the Registration Act is concerned, as a trial held with the aid of assessors, and concurring with one of them, *i.e.*, with the juror who constituted the minority, convicted the prisoners, under that section, and sentenced them to various periods of imprisonment.

Against this conviction and sentence this appeal has been preferred, and the main contention before us is, that the Sessions Judge is wholly wrong in treating the trial as having been held with the aid of assessors. In support of this contention the learned Counsel, who appears for the appellants, strongly relies upon the explanation of section 233. We think that this contention is valid. The explanation says: "If an offence triable with assessors is tried by a jury, the trial shall not, on that ground merely, be invalid." It further goes on to state: "If an offence triable by a jury is tried with assessors, the trial shall not on that ground merely be invalid, unless objection be taken before the Court records its finding."

It appears to me clear that under the first part of his explanation the Sessions Judge should have treated the trial as valid

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BHOOTNATH DEY.

Judgment.

and proceeded to record final order in accordance with section 263 of the Criminal Procedure Code.

It has been contended before us, on behalf of the Crown, that as the error was discovered before the trial was completed (because it was discovered before the Sessions Judge recorded his final order in the case), the explanation in question does not apply, but we think that in the language of the explanation the case was "tried by a *jury*," inasmuch as all that the jury had to do in the matter was done when they returned their verdict. On this ground, therefore, I think that the sentence that has been passed in this case is erroneous, and I would quash the conviction, and set aside the sentence.

The Sessions Judge must proceed in the case in accordance with section 263 of the Code. I would remand the case to the Sessions Judge, who must accept the verdict of the jury as one of acquittal, and then pass orders in accordance with section 263.

PRINSEP, *J.*:—

PRINSEP, *J.*

I entirely concur in the judgment that has just been delivered. I would only add that it was not competent to the Sessions Judge to treat the trial as regards the offence under section 82 of the Registration Act, as one held with the aid of assessors. There is nothing on the whole of the proceedings, until his memorandum was recorded on the 10th March 1879, that is, three days after the trial had been completed except so far as the Sessions Judge was personally concerned, and after he had expressed his intention to submit the case to this Court under section 263, because he disagreed with the verdict of the jury, that contains any reference to a trial with assessors. The trial was throughout conducted as a trial by jury.

The law requires that in a trial, held with the aid of assessors, at its completion, the Sessions Judge should take the opinion of each assessor orally, and should record it in writing, and that he should then consider those opinions and pass judgment according as he might think fit. Now, in this case, there is nothing to show what the opinions of the assessors individually were. All that is on record is a verdict, recorded as one of a jury, showing

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BHOOTNATH DEY.

Judgment.

PRINSEP, J.

that four out of five of the persons sitting on the trial considered the prisoners to be not guilty.

It has been held more than once by this Court that the opinions of the assessors should contain more than this, that it should contain the grounds on which their opinions are based. The prisoners would be entitled to insist that the Sessions Judge should take such opinions into his consideration before he forms and expresses his own opinion, before the case could be treated as a trial held with the aid of assessors. In other respects I entirely concur with the judgment of my learned brother MITTER, and with the order which he proposes to pass.

[CRIMINAL JURISDICTION.]

March 19th.

No. 113 of 1879.

SHURUT CHUNDER BANERJEE AND OTHERS PETITIONERS;

AND

BAMA CHURN MOOKERJEE . . . . . OPPOSITE PARTY.

Criminal Procedure Code (Act X of 1872) section 518—Haut, Removal of, to a distance—Jurisdiction.

Where a Magistrate made an order under section 518 of the Code of Criminal Procedure (Act X of 1872), directing one of two rival haut proprietors to remove his haut to such a distance as to render it useless for the purposes for which it was established, it was *held* that the order came within the purview of the Full Bench decision of *Gopi Mohun Moulik* vs. *Taramoni Chowdhrani*, 4 C. L. R., 309, and might be set aside as in excess of jurisdiction.

RULE to show cause why an order, passed by the Deputy Magistrate of Alipore, dated 29th March 1879, should not be set aside.

The proceedings in this case were instituted upon a petition filed by the complainant Bama Churn Mookerjee, praying for an order to restrain Shurut Chunder Banerjee, Jogendronath Holdar and Nogendronath Holdar from holding a haut, recently established by them opposite and in close proximity to his haut, which had been in existence for 11 years.

The order was prayed for on the ground that the defendants had been resorting to force in order to compel people to give their

patronage to their haut, rather than to the older haut, and that in consequence of such force being used serious riots and affrays had taken place, and more serious riots might be apprehended.

These hauts, which were situated close to Kalighat by the Temple of Kali, are kept chiefly for the purpose of supplying goats, kids and other things necessary for sacrifices to the Idol. The temple itself is much frequented by pilgrims and others, and at all times there is a large concourse of people about it.

From the evidence taken before the Magistrate it seems that, in spite of the fact that close to the temple a strong body of police was constantly located, there had been several breaches of the peace committed since the opening of the new haut. It also appeared that the proprietors of that haut had been employing *latials*.

Upon these facts the Deputy Magistrate, on the 29th March, under section 518 of the Code of Criminal Procedure (Act X of 1872), made the order complained of, directing the owners of the new haut to desist from holding their haut on its new site, and to remove it within one week to a distance of 20 russees (nearly half a mile.)

The effect of this order for removal to such a distance from the temple was to entirely destroy defendants' haut. Subsequently they applied to the High Court and obtained a rule calling upon the Deputy Magistrate and the complainant to show cause why the order should not be set aside.

M. Ghose, showed cause.

Baboo *Ashootosh Mookerjee, contra.*

Ghose.—This Court has no jurisdiction to interfere in this case, the Magistrate having stated that a riot or an affray being imminent, he considered it necessary to make the order complained of under section 518.

[WHITE, *J.*—But under the recent Full Bench decision the order of the Magistrate is bad, and we can set it aside.]

That may be in a civil case, but it does not decide the question whether this Court can interfere in its revisional jurisdiction. The power of interference as a Criminal Court is expressly taken

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SHURUT CHUNDER BANERJEE v. BAMA CHURN MOOKERJEE.

Judgment.

away by the Legislature enacting that orders passed under section 518 are not judicial proceedings.

[WHITE, *J.*—But under the charter we can set aside an order which the Magistrate had no power to make.]

It has been decided by a Full Bench of five Judges that this Court cannot interfere in such a case under section 15 of the Charter Act. *In the matter of Chunder Nath Sein.*, 2 I. L. R., Cal., 293.

[WHITE, *J.*—That case was considered by all the Judges in the recent Full Bench case, and that does not prevent our interfering when the order is without jurisdiction.]

It is difficult to distinguish that case from the present; there also the order was for all time.

[WHITE, *J.*—We must be guided by the more recent decision, which lays down that a Magistrate has no power to make such an order for an indefinite period.]

Unless your Lordships consider that the case of *Chunder Nath Sein* has been practically overruled, I submit that this Court cannot interfere, either under section 297 or under section 15 of the Charter Act. The Magistrate is competent to pass such an order, provided he is satisfied that the preservation of the public peace renders it necessary. In this case the Magistrate has come to a finding upon evidence, and he gave the other side an opportunity to show cause, but they declined to adduce any evidence.

[WHITE, *J.*—The Magistrate cannot say that a man shall not do what he has a clear right to do. He has practically directed the closing of the shop of the opposite side.]

It is difficult to conceive a valid order under this section by a Magistrate if your Lordships hold that the Magistrate had no power to direct what he has done in this case. The terms of section 518 are very wide.

Baboo *Ashootosh Mookerjee* was not called upon.

The judgment of the High Court (1) was as follows :—

We think that the order of the Magistrate comes within the purview of the late Full Bench order (*Gopi Mohun Moulick* v.

(1) MORRIS and WHITE, *J.J.*

Taramoni Chowdhrani, 4 C. L. R., 309,) and that the Magistrate has acted in excess of jurisdiction. He has given an order which will be in effect for all time for the removal of the haut to such a distance elsewhere as to render it of no use to the applicant. The rule is made absolte. 1879

[CRIMINAL REFERENCE.]

NUSIBUNNISSA BIBEE . . . . . *April 3rd.*

AND

SHEIKH ERAD ALI . . . . . No. 692 of 1879.

Criminal Procedure Code, Act X of 1872, *sections* 147 *and* 467—*Penal Code, sections* 211, 182 *and* 500—*Sanction to prosecute.*

A charge of theft was made before the Police, and while enquiries which afterwards resulted in the charge being found by the Police not to be proved, were pending, the charge was repeated in a complaint before the Magistrate of the district, by whom the matter was handed over to the Sub-Deputy Magistrate, who reported the charge as false. Whereupon the Magistrate directed the Police to enter the charge as false, but without ordering the formal dismissal of the petition of the complainant.

On the application of the accused, a counter-prosecution under sections 211, 182 and 500 of the Penal Code, was then sanctioned, and the case sent to the Deputy Magistrate for trial. That officer discharged the accused on the ground that the sanction of the Magistrate was illegal, as there had been, he alleged, (1) no judicial investigation as to the original charge; (2) no formal dismissal of the complaint; and (3) the witnesses produced by the complainant had not been all examined.

Held, that the Deputy Magistrate was bound to accept the sanction made by a superior Court as valid, and to leave the accused to question it before a competent Court if so advised; that a prosecution may be maintained in respect of a false charge made to the Police, or contained in a complaint which has been dismissed under section 147 of the Criminal Procedure Code, although there has been no judicial investigation, and that accordingly the Deputy Magistrate ought to have tried, the charge before him.

REFERENCE from the Officiating Magistrate of Howrah.

One Erad Ali laid a charge of theft of a necklace in the Police Station, against one Nusibun Bibee. The Police on enquiry

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Statement.

reported that the case was not proved. Before receipt of the Police report the District Magistrate, on a complaint of Erad Ali, preferred to him, directed that the complainant should bring his witnesses to prove the charge, and forwarded all the Police papers and the petition to the Sub-Deputy Magistrate for his opinion after examination of the witnesses. The Sub-Deputy Magistrate reported the case false, on which the District Magistrate passed an order on the back of the Police report "show as false." It does not appear whether he formally dismissed the charge. The accused Nusibun then applied to the Magistrate for permission to prosecute Erad Ali for bringing a false charge, and for defamation, on which the Magistrate sanctioned the prosecution under sections 211 and 182 P. C., summoned the accused and made over the case to the Deputy Magistrate Pundit Srish Chunder Veydarutna for trial. The Deputy Magistrate, on hearing both sides, discharged the accused on the following grounds: *First*, that the sanction to prosecution under sections 211 and 182 was illegal, inasmuch as there was no judicial investigation into the charge of theft originally made by the accused; *secondly*, that the Magistrate did not pass the formal order of dismissal on the petition of Erad Ali; and, *thirdly*, that the Sub-Deputy Magistrate did not hear all the witnesses produced by Erad Ali as he should have done before pronouncing his complaint to be a false one.

Under these circumstances, the Magistrate referred the matter to the High Court, as he was of opinion that the order of the Deputy Magistrate should be set aside for the following reasons stated by him as follows:—

1*st*.—That no sanction, under section 468, Act X of 1872, was necessary when the original charge was preferred to a Police Officer, *vide* 25 W.R., page 33.

2*nd*.—That the offence under section 211 consists in the making of the charge, and not in prosecuting it; no judicial enquiry into the charge was therefore necessary. *Vide* I. L. R., 1 All. series, 497.

3*rd*.—That the prosecution was not pending when the sanction was accorded by the District Magistrate to prosecute under sections 211 and 182 of the Penal Code.

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Judgment.

4th.—That whatever may have been the nature of the enquiry to test the truth or falsehood of the original case, whether that enquiry is said to be full and ample, or meagre and insufficient, I think that when after making it the Magistrate pronounced the original case false, and referred the present complainant's charge, under sections 182 and 211 to the Deputy Magistrate for trial, the said Deputy Magistrate was bound to come to a finding on the merits of this second case, and not discharge the defendant on a legal technicality.

5th.—No sanction to prosecution under section 500 was necessary.

The judgment of the Court (1), after stating the facts above set out, proceeded as follows:—

We think the Deputy Magistrate was wrong to question the sanction given by the Magistrate. It was an order made by a superior Court purporting to be made under a particular provision of law. Whether it was rightly or wrongly made was not for the Subordinate Court to enquire into. The Deputy Magistrate was not sitting as a Court of appeal or revision to examine the mode in which the Magistrate of the District had dealt with the case in which he had sanctioned a prosecution under section 211 of the Penal Code. He was bound to accept the sanction as valid, and leave the accused to question it before a competent Court if so advised.

But the Deputy Magistrate was not only wrong in this; in our opinion he was wrong on both the first and third of the grounds taken by him.

A prosecution may be maintained in respect of false charges made to the Police, or contained in a complaint which has been dismissed under section 147, Criminal Procedure Code, although there has been no judicial investigation, though where the accused has been brought before a Court, it is wrong to throw out the charge against him summarily, and not to complete the enquiry set on foot by the issue of a summons or warrant for his appearance. If it were otherwise, complaints dismissed under section 147 could never be the subject of a prosecution, yet there is no warrant for

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saying that the offence provided for, under section 211, is not committed simply because it happens to be innocuous to the person intended to be injured.

And as to the third ground the Deputy Magistrate is clearly wrong in treating the preliminary enquiry by the Sub-Deputy Magistrate, which was held under the provisions of section 146 as a trial subject to the rules in Chapters XVI and XVII of the Code of Procedure. The reported cases cited by him refer to *trials*, and have no bearing on the present case.

But even if the District Magistrate was in error in sanctioning a prosecution under section 211, in respect of the complaint before himself, and as to this we think he did err inasmuch as the departmental order to the Police to "show the case as false," was not a formal dismissal of the complaint under section 147, this complaint, as far as we can see from this record, is still pending, in the sense that no order has been made on it as against the complainant, yet there were before the Deputy Magistrate several charges he was bound to consider.

The complaint included a charge under section 500. The summons was under sections 182 and 211 P. C.

Now, as regards the charge under section 182, there was the sanction required under section 467, Criminal Procedure Code, and the charge under section 211, P. C., would cover the charge made at the Police station, in respect of which no sanction is required (see 25 W. R., 33), as well as the charge made directly to the Magistrate requiring sanction under section 468.

We cancel the order of the Deputy Magistrate, and direct him to try the accused on the charges before him.

[CIVIL APPELLATE JURISDICTION.]

RAGENDRO LOLL GOSSAMI . . . . . APPELLANT;

AND

SHAMA CHURN LAHOORY AND ANOTHER RESPONDENTS.

1879
April 8th.

No. 1250 of 1878.

Valuation of Partition Suit—Jurisdiction—Market-value of subject-matter.

In a partition suit the plaintiffs, who claimed a four-anna share of 21 cottahs of land, of which the value was not more than Rs. 150 per cottah, valued their claim at Rs. 600. *Held*, that the valuation fixed by the plaintiffs was not unreasonable.

Per Curiam.—In a suit for partition, strictly speaking the valuation of the claim would be that at which the plaintiff would value the convenience of changing the form of his enjoyment of the share, and neither a decision as to the valuation of a previous suit for a portion of the same land, nor an enquiry as to the market value of the land, would be particularly relevant.

APPEAL from a decision of the District Judge of Hooghly, reversing the decree of the Moonsiff of Serampore.

The plaintiffs instituted a partition suit before the Moonsiff of Serampore, claiming to be entitled to a four-annas share of 1 beegah 1 cottah of rent-free land.

Their claim they valued at Rs. 600, that being the alleged market value. The defendant objected to the jurisdiction of the Court on the ground that the property was worth not less than Rs. 2,000. Evidence was gone into as to the value of the disputed lands.

The two witnesses who were examined for the defence were each asked one question, viz., what is the value of the land in dispute? And this question they answered, one by saying it might be Rs. 300 to 350, and the other it might be from Rs. 250 to 300 per cottah. From cross examination it appeared that these answers were mere dogmatic opinions.

The evidence of the plaintiffs and of their witnesses spoke of actual transactions, some of them vouched for by the production of documents, and the highest value shown was Rs. 150 per cottah, the average value appearing from their statements being Rs. 125.

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Judgment.

In addition to this evidence, however, an authenticated copy of a judgment of the Subordinate Judge was put in by the defendant, from which it appeared that one of the defendants had sued the plaintiffs for recovery of 2 cottahs out of the 5¼ cottahs claimed here, and valued his suit at Rs. 1,090. In his judgment the Subordinate Judge says "the price of 2 cottahs of land in suit might be less than Rs. 1,000 so as to give the Moonsiff jurisdiction." From this statement the Moonsiff was of opinion that the Subordinate Judge had fixed the price per cottah at Rs. 450. On the basis of that calculation he found that he had no jurisdiction to try the suit, and accordingly dismissed it, with leave to the plaintiffs to institute another suit for their claim in the proper Court.

The plaintiffs, thereupon, appealed. The District Judge, before whom the appeal was heard, thought that the dictum of the Subordinate Judge, upon which the other Court had acted, was no guide, and upon the evidence found that Rs. 150 per cottah was a fair valuation of the land claimed. He accordingly decreed the appeal, and remanded the case to the Moonsiff for trial upon the merits.

Against this decision the defendant now appealed to the High Court.

Baboo *Obhoy Churn Bose*, and Baboo *Troylokho Nath Mitter*, for the Appellants.

Branson, and Baboo *Surendro Nath Muttylall*, for the Respondents.

The judgment of the Court (1) was as follows:—

We think this appeal cannot be supported, not that we concur with the Courts below as to the grounds on which they proceeded. It seems to me quite a fallacy to suppose that it was necessary to value this suit at the selling price of the quantity of land to which the plaintiffs' share, when separated, would amount. Strictly speaking, the valuation would be that at which the plaintiffs would value the convenience of changing the form of their enjoyment of the share, and neither the decision as to the

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value of the previous suit, nor the enquiry as to the market-value of the land was particularly relevant. So far as we can see, the plaintiffs valued the suit not unreasonably—certainly not too low—at the amount stated in the plaint. We think the Moonsiff ought to have proceeded to try the suit on the merits.

1879

The appeal is dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

DAIMODDEE PAIK . . . . . (PLAINTIFF) APPELLANT;
AND
KAIM FARIDAR AND OTHERS . (DEFENDANTS) RESPONDENTS.

May 28th.

No. 2436 of 1878

Contract, Inadmissibility of Parol Evidence to vary a written—Conduct of Parties—Evidence Act, I of 1872, section 92—Statute, Construction of.

The defendants, in answer to a suit by the plaintiffs for possession of certain lands, alleged that a registered kobala, which purported to transfer the lands to the plaintiffs, was intended by the parties to operate merely as a mortgage. *Held*, that they could not be allowed to adduce evidence furnished from the acts and conduct of the parties for the purpose of so varying or subtracting from the written contract.

Kashi Nath Chatterjee vs. *Chundi Churn Banerjee*, B. L. R., Full Bench, 383, considered to be over-ridden by section 92 of the Evidence Act.

APPEAL from a decision of the Judge of the 24-Pergunnahs, reversing a decree of the Second Moonsiff of Diamond Harbour.

In this suit the plaintiff sued for possession of certain lands on the ground that the defendants were his tenants, and had denied his title in a former suit. He alleged that the defendants had sold to him the disputed lands for Rs. 19 by a registered kobala, dated the 10th Srabun 1276, and that after the sale had taken a lease of the same lands under a kabuliut of the same date.

The defendants, on the other hand, contended that under the kobala of 10th Srabun, they had merely mortgaged the disputed lands to the uncle and father of the plaintiff; that they had remained in possession paying interest to the plaintiff's father and uncle; that the kabuliut filed by the plaintiff was not genuine; that they had paid up all interest due up to 1283.

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DAIMODDEE PAIK v. KAIM FARIDAR.

Judgment.

The Moonsiff found the kabuliut to be a genuine document. He refused to allow parol evidence to be adduced to show that the kobala, which purported to transfer the lands absolutely, was intended by both parties to operate as a mortgage only. The evidence adduced by the defendants to show that the plaintiff had waived the contract as embodied in writing and had by his conduct all along treated the transaction as one of mortgage, was entirely disbelieved by the Moonsiff.

A decree was accordingly given for the plaintiff.

On an appeal by the defendants the District Judge was of opinion that parol evidence was admissible to show that a bill of sale, though absolute in its terms, was a mortgage, and had been treated by the parties as such, and on examination of the evidence for the defence he found that in this case the kobala was intended to operate as a mortgage merely, and had been so treated.

He accordingly dismissed the suit. The grounds of the judgment of the District Judge were thus stated: "The Evidence Act is one 'to consolidate, define and amend' the law of evidence, and *primâ facie* made no change in the former rules. Further, as far as I can see, there has not been the slightest change in the law as regards the inadmissibility of oral evidence to vary or alter a written document, and yet the evidence of the acts and conduct of the parties was always admissible to determine whether the document was or was not a mortgage—*Kashi Nath Chatterjee* vs. *Chundi Churn Banerjee*, B. L. R., F. B., 383, and until it is otherwise decided I shall follow that ruling."

A second appeal was now preferred by the plaintiff.

Baboo *Doorga Mohun Dass*, for Appellant.

Baboo *Byddonath Dutt*, for Respondents.

The following judgment of the Court (1) was delivered by

JACKSON, *J.*

JACKSON, *J.*:—

The point raised in this special appeal is one which we have considered on more than one occasion previously. We have no doubt that the Judge is in error in thinking that the parties are at

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liberty to rely upon the evidence furnished by the conduct of parties for the purpose of varying, adding to, or subtracting from the terms of a written contract. The evidence so given can only be evidence of an agreement which, as it was not written, must have been oral, and that is in distinct violation of the terms of section 92 of the Evidence Act. The case decided by the Full Bench was before the Evidence Act came into force, and moreover I understand in that case there was a written instrument relied upon, viz., a kabuliut, and the evidence of conduct was adduced by the learned Chief Justice as giving support to that written instrument so as to make it probable that the parties had really intended a mortgage, and not a sale out and out. I am referred to a case in 11 W. R., page 450, heard by Mr. Justice MARKBY and myself, in which we both separately expressed the same opinion which the present Division Bench expressed only last week in another special appeal. I observed in that case :—"I confess that I have some difficulty in comprehending the distinction between the admissibility of evidence of a verbal contract to vary a written instrument, and the admissibility of evidence showing the acts of the parties, which, after all, are only indications of such unexpressed unwritten agreement between the parties," and Mr. Justice MARKBY said : "It seems to me very difficult to understand the distinction there drawn between evidence of a parol agreement, contradicting the terms of a written contract being inadmissible, and evidence of the parties contradicting the terms of such a contract being admissible." Although we both accepted the ruling of the Full Bench which it is to be borne in mind was a ruling of three Judges against two, in regard to the particular case in which it was given, we think the judgment of the Moonsiff in this case refusing to admit parol evidence was right, and that the judgment of the lower Appellate Court must be reversed with costs.

I would add also that it appears to me very material to consider this section (92) of the Evidence Act with the provisions of the Registration Act. It is highly important, and surely in accordance with the intention of the Legislature in passing the Registration Act, that parties should be compelled to register the precise contract which they have made. It would be extremely inconvenient if parties should register as a bill of sale what afterwards

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turns out on the evidence of conduct to be merely a mortgage.

Another observation I would make in this case is this: It appears to me to be no answer to the direct provisions of a particular section of an enactment to say that the enactment was described in terms as an enactment to consolidate, amend, and define the provisions of previously existing laws, and that the particular rule, contended for is not to be found among the previously existing laws. It is sufficient if the provision relied upon is a part of the Act, whatever the description or the purposes of the Act may be.

[CIVIL APPELLATE JURISDICTION.]

May 28th.

No. 2588 of 1879.

MOHINI CHUNDER MOZUMDAR . . . APPELLANT;

AND

JOTIRMOY GHOSE AND OTHERS . . . . . RESPONDENTS.

Regulation VIII of 1819, *section* 11—*Sale for Arrears—Cancelling of under-tenures—Act VIII* (*B.C.*) *of* 1865, *section* 16—*Act VIII* (*B.C.*) *of* 1869, *section* 27.

Lands appertaining to a certain talook which was sold under Regulation VIII of 1819 for arrears, were held from the owner of the talook under a *kaimi jumma* tenure, under which the plaintiff, who sued the purchaser for confirmation of his title, cultivated the land through persons called *burgaits* with whom he shared the profits in some way. *Held*, that under section 11 of that Regulation the plaintiff's tenure was cancelled.

Compare *Unnoda Churn Das* vs. *Mutthuranath Das Biswas*, 4 C. L. R., 6; *Ranee Surnomoyee* vs. *Maharajah Suttees Chunder Roy Bahadoor*, 10 Moore's I.A., 123, cited and discussed.

APPEAL from a decision passed by the Subordinate Judge of Jessore, affirming a decree of the 3rd Sudder Moonsiff of that District.

Baboo *Rash Behary Ghose*, and Baboo *Doorga Mohun Dass*, for the Appellant.

Baboo *Guru Doss Bannerjee*, for the Respondents.

The facts of the case and the findings of the lower Courts are

sufficiently set forth in the following judgment of the High Court(1), which was delivered by

JACKSON, *J.*:—

The plaintiff brought the suit under the provisions of Act VIII of 1859, that is to say, as a regular civil suit "to obtain possession by confirmation of kaimi jumma right to about 51 bighas of kaimi jumma land." The right or title on which the plaintiff sued was alleged to be a grant from the late Fukeer Chand Roy, the predecessor of defendant No. 1, in favour of one Hur Chunder Ghose, who was the maternal grandfather of Jotirmoy Ghose, on whose behalf the suit was brought.

The defendant answered, amongst other things, that the talook to which the disputed land appertained, belonged to the former owner Fukeer Chand Roy; that the same being sold by auction under Regulation VIII of 1819, free from encumbrances, was purchased in the name of his brother's son, Upendro Chunder Mozumdar; and that he was in possession of the aforesaid talook free from incumbrances. I should have mentioned that the alleged dispossession took place in Cheyt 1282, and the suit was commenced on the 2nd Falgoon 1285.

The Moonsiff found that the putni had been purchased by the defendant No. 1, under the provisions of Regulation VIII of 1819. He says:—"There is no doubt that the right alleged by the plaintiff cannot stand valid according to the aforesaid Regulation in preference to the right which the defendant has purchased by auction in the aforesaid talook." He goes on to say:—"The defendant No. 1 does not say that he has exercised his purchased right, and that whatever right the plaintiff had has become extinct." He further found that the defendant No. 1 received rents from the plaintiff for seven or eight years, and granted him dakhillas, and then observed:—"If the defendant No. 1 after having purchased the putni began receiving rents from the plaintiff, he, the defendant, cannot, on the strength of the said purchase, alone eject the plaintiff from the land he has been holding possession of. A notice should be duly given to the plaintiff, or the defendant No. 1 should take possession by

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Judgment.

JACKSON, J.

enforcing his right in Court, but he is not competent to eject the plaintiff from the land under claim," so he gave judgment for the plaintiff.

The defendant appealed against this decree, and there was a cross appeal by the plaintiff who was dissatisfied with the declaration that the jumma right had become extinct.

As to the appeal of the plaintiff, the Subordinate Judge, in language which is not as clear as it might be, seems to be of opinion that the defendant, by the receipt of rent subsequent to his becoming the owner of the putni, had in some manner ratified the previous jumma which the plaintiff claimed, and upon the appeal of the defendant he observed:—"In this suit it is needless to try whether or not the jumma alleged by the plaintiff is a kaimi mourosi jumma. But when it is proved by the documents filed by the plaintiff, and the oral evidence adduced by him, that the disputed land is covered by the pottah alleged by the plaintiff; that at first, the plaintiff's predecessor, and afterwards he, plaintiff, as guardian of the minor, were in possession thereof; that the plaintiff was unjustly dispossessed therefrom by the defendant; and that the defendant, without taking any step according to law, unjustly dispossessed the plaintiff, then the defendant can, in no way, retain the said land in his possession." He therefore dismissed the defendant's appeal.

The defendant has made a further appeal in this Court, and the question to be determined depends upon the construction partly of section 11 of Regulation VIII of 1819, and partly also upon the terms of section 27 of the Rent Act.

It seems to me that the defendant, in his answer, as well as the Courts below, in their judgment, are not quite accurate in referring to the first clause of section 11. Act VIII of 1865 seems to comprise in a single clause what the Putni Regulation provided for in two clauses. The words of Act VIII of 1865, which have been referred to, are (section 16): "The purchaser of an under-tenure, sold under this Act, shall acquire it free of all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives or assigns, unless the right of making such incumbrances shall have been expressly vested in the holder by the written engagement under

which the under-tenure was created, or by the subsequent written authority of the person who created it, his representatives, or assigns. Provided that nothing herein contained shall be held to entitle the purchaser to eject khoodkhast ryots." Therefore, in the section, no doubt, the Legislature, speaking of encumbrances, had in view the creation of under-tenures which would tend to diminish the permanent assets of the talook. But section 11 of Regulation VIII has more than one clause. The first of them provides that "any talook or saleable under-tenure that may be disposed of at a public sale, under the rules of this Regulation, for arrears of rent due on account of it, is sold free of all incumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by a stipulation to that effect in the written engagements under which the said talook may have been held. No transfer by sale, gift or otherwise; no mortgage or other limited assignment, shall be permitted to bar the indefeasible right of the zemindar to hold the tenure of his creation answerable in the state in which he created it, for the rent, which is in fact his reserved property in the tenure, except the transfer or assignment should have been made with a condition to that effect, under express authority obtained from such zemindar." The clause appears to refer to other acts of the defaulting putnidar than engagements with cultivators or under-tenants. Those are referred to in the second clause, which is in these words:—"On sale of a talook for arrears, all leases originating with the holder of the former tenure, if creative of a middle interest between the resident cultivators and the late proprietor, must be considered to be cancelled, except the authority to grant them should have been specially transferred; the possessors of such interests must consequently lose the right to hold possession of the land, and to collect the rent, of the ryots; this having been enjoyed merely in consequence of the defendant's assignment of a certain portion of his own interest, the whole of which was liable for the rent." Clearly the interest which the plaintiff claimed in this suit was an interest of that kind. He did not himself cultivate the lands; he held them through persons called *burgaits*, and in some form

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Judgment.

JACKSON, J.

or other shared the profits of the lands with those persons. Now, in a recent case—*Unnoda Churn Das* vs. *Mothura Nath Das Biswas*, 4 C. L. R., 6—heard before the Chief Justice, myself and my brother PONTIFEX under the terms of Act VIII (B.C.) of 1865, it was held that the under-tenures there spoken of as incumbrances were actually avoided by the terms of the Act itself, and that no action on the part of the purchaser was necessary. The plaintiff respondents' pleader before us has referred us to a judgment of the Privy Council in the case of *Ranee Surnomoyee*, 10 Moore's I. A., 123, which turns upon a different enactment, viz., the 5th section of Regulation XLIV of 1793. That Regulation, if it had any application to the present suit, has been entirely repealed by Act XXIX of 1871; and, although in that case their Lordships undoubtedly declared against a strict, hard and literal construction of the words therein used which are very similar to the words considered here, viz., "shall stand cancelled from the day of sale," their Lordships arrived at that conclusion as to the construction of the section in these words, viz., "that a power was given by it to the purchaser at a Government sale for arrears to avoid the subsisting engagements as to rent, and to increase the rent to that amount at which, according to the established usages and rates of the Pergunnah or District, it would have stood, had the cancelled engagement so avoided never existed." But in arriving at that conclusion they were very much influenced, I think, by what they say immediately before, viz.:—"The language of the exception, too, in section 7 shows that what was aimed at by section 5, was not the distinction of tenure, but the increase of rent, under certain specified and equitable limitations." That being so, I think that we are not embarrassed in considering this case by the words of that ruling. It seems to me that we may quite fairly and correctly hold that in the present case, the possessor of the interest claimed by the plaintiff had lost the right to hold possession of the land, that is to say, the right upon which his suit was founded, and that no purely civil suit could be maintained upon any such right, but that by occupancy of the land, since the purchase by the defendant, by continuing to pay the rent he had undoubtedly obtained the position and rights of a tenant. It is not necessary now to deter-

mine precisely what these rights were, and if, in that position, he was illegally ousted by the person entitled to the rent, I think that was his exact position, and that being his position, it seems to me to fall precisely within the terms of section 27 of Bengal Act VIII of 1869. It says:—"All suits for the recovery of damages on account of the illegal exaction of rent, &c., and all suits for abatement of rent and all suits to eject any ryot, &c., &c., and all suits to recover the occupancy of any land, farm, or tenure from which a ryot has been illegally ejected, &c., &c., shall be commenced within the period of one year from the date of the accruing of the cause of action and not afterwards." Even if this were not so, it appears to me, we should not be in a position to maintain the judgment of the lower Appellate Court, because by that judgment the plaintiff has been allowed to recover a decree upon a cause of action entirely different from that set out in his plaint. The cause of action alleged in the plaint was the infraction of the right which he possessed as holder of a *Mourosi kaimi jumma*, and it being clear that the mourosi kaimi jumma had been cancelled by the terms of section 11 of Regulation VIII of 1819, we do not think the plaintiff ought to have been allowed to recover a decree merely upon the grounds that he is a tenant whose tenancy had been put an end to without notice. That, however, is not material even if we suppose that he could recover upon a cause of action so entirely different from that set out in the plaint, we think the suit has been brought too late, being brought about two years after dispossession. I think the judgment of both the lower Courts are erroneous, and that the plaintiff's suit ought to be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

1879
June 11th.

No. 277 of 1877.

CHOWDHRY RADHA CHURN DASS . . . . } (PLAINTIFF), APPELLANT;

AND

CHOWDHRY KRIPA SINDHU DASS AND OTHERS . } (DEFENDANTS) RESPONDENTS.

Joint Hindu Family (Mitakshara)—Suit for Partition—Admission of disruption of Unity of Family—Onus of proof—Partial Partition.

Plaintiff, who was the adopted son of the third of three brothers, who, until about 1843, when the second seceded, formed a joint Hindu family, governed by Mitakshara law, sued as heir of his adoptive father, the defendants who represented the eldest brother, and in whose hands the family property had remained, for an 8-anna share of the ancestral property. He alleged that his adoptive father had never separated from the joint family, and that, until 18th Joishto 1282, he had, as heir of his adoptive father, remained joint in estate and food with the elder branch of the family. The defendants denied this allegation, stating that the plaintiff and his adoptive father had seceded from the joint family, at the same time as the second of the three original brothers.

Held, that the fact of a separation of the family having been admitted to have taken place many years ago, and of the family property having been allowed to remain in the hands of the defendants, threw the *onus* upon the plaintiff to give some *primâ facie* proof of the right which he claimed, the presumption of the continued unity of the joint family not arising where admittedly a disruption of that union had taken place.

Quære.—Whether by Hindu law a partial partition of family property can take place except by arrangement.

REGULAR APPEAL from a decision passed by the Subordinate Judge of Cuttack.

The suit arose out of the following circumstances: Jannojoy, Jankee, and Kanhai were three brothers, forming a joint undivided Hindu family, under Mitakshara law. Radha Churn, the plaintiff, was the third and youngest son of Jannojoy, and was adopted by Kanhai. Jankee, it is admitted, separated from the family many years ago. Radha Churn, as the heir of one of the two remaining brothers, now sued the

defendant, who, as he stated, represented the other brother Jannojoy, for a half share of the remaining ancestral estate. It appears that on the death of Sham Soonder, the eldest son of Jannojoy, the defendant Kripa Sindhu succeeded in establishing his claim to a certificate under Act XXVII of 1860, and that this gave rise to the present suit, though the status of Kripa Sindhu is not here raised, since he is admittedly the son of the second son of Jannojoy, and therefore, in either capacity a member of the family. The other persons made defendants also hold doubtful positions in this family, one of them being the son of the plaintiff, who, it is stated, was adopted by the son of Sham Soonder before he died, though that is denied by Kripa Sindhu.

The plaintiff contended that as heir of Kanhai he had lived in commensality with the elder branch of the family, represented by the heirs of Jannojoy, up to the 18th Joishto 1282, when he demanded, and was refused, his half share of the family estate.

Kripa Sindhu, who alone contested this claim, on the other hand, states that Jankee and the plaintiff separated from the elder branch of the family before the settlement, that is, before 1843, and that, at any rate, owing to a custom prevalent in their family, he is not entitled to a full share, as the estate invariably belonged to the senior member of the family, the others being merely entitled to so much as would provide them with maintenance.

The Subordinate Judge found, that when Jankee separated, the family ceased to be joint, and that consequently the suit was barred by limitation.

The plaintiff appealed against this finding.

Baboo *Annoda Pershad Banerjee*, Baboo *Chunder Madhub Ghose*, and Baboo *Ambica Churn Bose*, for the Appellant.

Baboo *Mohesh Chunder Chowdhry*, and Baboo *Abinash Chunder Banerjee*, for the Respondents.

After stating the facts, the judgment of the High Court (1) proceeded as follows :—

The plaintiff contends, on appeal, that the lower Court has

(1) GARTH, *C.J.*, and PRINSEP, *J.*

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dealt erroneously with the case in point of law, because it has not given the plaintiff the benefit of the ordinary rule in such cases, that when once the family is shown to be joint, it is presumed to remain so, until an actual separation is proved. He says, moreover, that no direct proof of the plaintiff's separation has been adduced, and that it has not been shown what part, if any, of the ancestral property was appropriated to the plaintiff at the time of the alleged separation.

Now it is perfectly true that, for several generations back, that section of the family to which both the plaintiff and the defendants belonged, was undoubtedly joint, but then it is admitted on both sides that about 40 years ago a separation of that section took place, by which one member at least, Jankee, (the brother of the plaintiff's adoptive father), ceased to belong to the joint family.

The defendant, Kripa Sindhu says, that on that occasion the plaintiff and his adoptive father Kanhai Dass also ceased to be members, while the plaintiff's contention is, that Jankee was the only seceding member.

However this may be, we think that the presumption of the continued unity of the joint family, (which undoubtedly is the ordinary rule in these cases), cannot be applicable here, because when once it is admitted that a disruption of the unity has taken place, it is difficult to see how any presumption can arise, as to any other particular member or members having continued joint or become separate.

It seems indeed very doubtful, whether by the Hindu Law any *partial partition* of the family property can take place, except by arrangement.

Mr. Mayne, in his valuable book on Hindu Law, lays it down in section 416, that "a partition may be partial, either as regards the *persons making* it, or the *property divided*," but the authorities to which he refers seem scarcely to support his position.

One can very well understand, that as regards *separation*, any member or members of a family might *separate* from the rest at their option. A mere declaration by one member *that he was separate* from the others would seem to be sufficient to effect the separation. But *partition* of the property is a different thing,

because in order to effect a just partition, it is necessary of course to ascertain the share to which each and every member of the family is entitled; and we have not been able to find any case in the books, in which either a suit has been brought for a *partial partition*, or a partial partition has been *adversely decreed.*

Be that as it may, we certainly think that in a case like the present, where a separation of the family is admitted to have taken place many years ago, and the family property has remained in the hands of the defendants, the plaintiff, who claims to be joint with the defendants, and to be entitled to a share in that property, should, at any rate, give some *primâ facie* proof that he is entitled to the right which he claims, more especially, as in this instance he happens to be the oldest member of the family, and the only member who was alive when Jankee separated; so that he is better acquainted with its history and circumstances than any other man now living.

Instead of this, not only has he himself refrained from coming forward as a witness in support of his case, but he has not thought proper to call any other member of the family; and of the witnesses whom he has called, some know really nothing of the matter, and others know so little, that it is impossible to place any reliance upon their testimony.

The Subordinate Judge has, for these reasons, disbelieved the plaintiff's case, and considers that the defendants' witnesses are far more worthy of credit.

We think that in his appreciation of the evidence he has exercised a sound discretion, but even if we entertained any doubt upon this, we feel that it would be impossible to reverse his finding, when the plaintiff himself, who knows more of the circumstances than any one, has not vouchsafed to afford the Court any information whatever.

It has been argued by his counsel, that as the defendants are admitted to have been the elder branch of the family, and in possession of the ancestral properties, it was their duty to have brought forward the books and accounts, in order to show how the income of the property has, from time to time, been applied, and the production of these documents might have been procured by the plaintiff himself, and it is clear that he knew what the documents were, because one of his own witnesses, who was the

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tehsildar of the defendants' father, describes in his evidence how the business of the estates was conducted, and how the books and accounts were kept.

If suitors, who have the means, and whose duty it is to bring before the Court the best evidence in support of their claims, advisedly abstain from doing so, it is only reasonable to infer that, if the evidence had been produced, it would not have been in their favor.

The appeal is dismissed with costs.

[CRIMINAL JURISDICTION.]

May 10th.

EMPRESS *vs.* FELIX MAQUIRE.

No. 11.

Mutiny Act (41 Vic., cap. 10) section 101—Andaman and Nicobar Islands, Jurisdiction of Criminal Courts in—European British Subjects.

Section 101 of the Mutiny Act (41 Vic., cap. 10) does not deprive the Criminal Courts of jurisdiction over British soldiers committing offences within the territorial limits of these Courts, nor render the exercise of their jurisdiction dependent upon the sanction of the Commander-in-Chief.

THIS was a reference under section 296 of Act X of 1872, and section 13 of the Andaman and Nicobar Islands Regulation of 1876, from the Sessions Judge and Chief Commissioner of the Andaman and Nicobar Islands, under the following circumstances:—

One Felix Maquire, a private of the 89th foot, was committed for theft, by the first Assistant Superintendent, to the Court of the Sessions Judge, the commitment having been made without any communication having taken place upon the subject with His Excellency the Commander-in-Chief. The Sessions Judge was of opinion that under the 101st section of the Mutiny Act (41 Vic., cap. 10) the committing Magistrate could not exercise jurisdiction in the case independently of the sanction of the Commander-in-Chief, and accordingly referred the matter to the High Court.

The judgment of the High Court (1), upon the reference was as follows:—

We have referred to the 101st section of the Mutiny Act (41

(1) MORRIS and WHITE, *J.J.*

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Judgment.

Vic., cap. 10, A.D 1878), and are of opinion that that section (which is also to be found in the Mutiny Acts, between 1873 and 1878,) does not deprive the Criminal Courts of jurisdiction over British soldiers committing offences within the territorial limits of these Courts, nor render the exercise of their jurisdiction dependent upon the sanction of the Commander-in-Chief.

The 101st section simply provides that as regards criminal offences, committed by British soldiers serving in India or its dependencies, and at a distance of more than 120 miles from the Presidency Towns, the offenders *may* be tried by a General Court-Martial, the appointment of which rests with the Commander-in-Chief. It appears to us that the section is merely permissive of a military trial being held. In this case the Court has got possession of the investigation of the offence, and the military authorities have not availed themselves of the alternative procedure of trying the offender by a General Court-Martial.

Under these circumstances we think that the Court of the first Assistant Superintendent, was a competent Court to commit the accused for trial on a charge of theft, and that the Court of the Sessions Judge and Chief Commissioner is a competent Court to deal with the case so committed, and we accordingly direct the latter Court to dispose of the case.

NOTE—The Andaman and Nicobar Islands Regulation, III of 1876, provides:—

Section 13, clause (*c*). The functions of the High Court as a Court of Reference shall be discharged by the Governor-General in Council.

Clause (*d*). The functions of the High Court, as a Court of Revision, shall be discharged in respect of proceedings of the Court of Session, by the Governor-General in Council, and in respect of Courts subordinate to the Court of Session by the Court of Session;

Clause (*e*). All other functions of the High Court shall be discharged by the Court of Session.

* *

Clauses (*d*) and (*e*) of this section shall not apply to proceedings against European British subjects, or persons jointly charged with European British subjects.

[CIVIL APPELLATE JURISDICTION.]

1879 *May 19th.*

No. 1 of 1879.

DHURONIDHUR SEN AND ANOTHER . . . } . . (DEFENDANTS) APPELLANTS;

AND

AGRA BANK, (LIMITED) . . . (PLAINTIFF) RESPONDENT.

Injunction to restrain Decree-holder from executing decree—Suit to set aside order—Illegal order—Limitation Act, IX of 1871, *Schedule II, Art.* 15—"*Dena-powna*" *clause.*

In 1861, A mortgaged an indigo concern to plaintiff, who afterwards entered into possession as mortgagee. While plaintiff was in possession, a putni included in the mortgage was brought to sale and sold for arrears of rent under the provisions of Regulation VIII of 1819. As a consequence of this sale, the durputni of C in this talook was cancelled, and in 1867, C brought an action for damages against the executors of A, and obtained a decree. In 1869 the executors of A sold the equity of redemption in the concern, by a deed of sale, containing a *dena-powna* clause, to plaintiff, and subsequently on the 21st June 1871, on C's application, plaintiff's name was, without objection on his part, substituted on the record as the representative of the judgment-debtor. Plaintiff afterwards applied under section 15 of the Charter Act to have the order set aside, but his application was refused.

Held, in a subsequent suit for a declaration that the order of 21st June 1871 was illegal, and for an injunction restraining C from taking proceedings under the decree: that although that order could not be set aside in that suit, plaintiff was entitled to have C restrained by a perpetual injunction from taking any further proceedings.

Held, also, that the fact of the plaintiff's not having appeared to oppose the substitution of his name on the record as representative of the judgment-debtor, did not disentitle him to be relieved from the effect of the order in question, the Court having had no power to make such order.

APPEAL under section 15 of the Letters Patent from a decision of WHITE, *J.*

This appeal was originally heard by WHITE and MITTER, *JJ.* These judges were however divided in opinion, and the judgment of the former prevailed. Against that judgment the defendants, under section 15 of the Letters Patent, preferred an appeal which

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was heard by JACKSON, Offg. *C.J.*, MARKBY and AINSLIE, *J.J.*, who reversed the decision of the Division Bench.

A review was thereupon applied for and granted, and the appeal now came on for re-hearing.

The proceedings of the Division Bench and of the Court which heard the Letters Patent Appeal, will be found reported in 2 C. L. R., 283 (where the facts are set out), and in 3 C. L. R., 421, respectively.

Woodroffe and *Evans*, for the Agra Bank.

Baboo *Rashbehary Ghose*, for the Defendants.

Baboo *Rashbehary Ghose*.—It has been held by a Full Bench that on a *dena-powna* clause a suit may be brought by a creditor directly against the purchaser—*Kearnes* vs. *Bhowani Churn Mitter*, B. L. R. Sup. Vol., 58. Such suits were very frequently entertained by the Sudder Dewany Adawlut.

Evans.—There are cases which say, that suits for damages are not *dena-powna*.

[JACKSON, *J.*—We were all agreed that the debt was not one which would come within the *dena-powna* clause. The debt was not one of the debts of the concern.]

[AINSLIE, *J.*—I thought we had to-day only to consider a question of law, and that that point could not be gone into.]

[JACKSON, *J.*—The question as to whether this debt was *dena-powna* or not was not gone into, on the former occasion, before us.]

Baboo *Rashbehary Ghose*.—The reason was, that on the first hearing WHITE, *J.*, refused to allow me to go into that question.

Baboo *Rashbehary Ghose*.—Then the only other question to be considered is, whether a suit, such as this, to restrain a proceeding in another Court, will lie in this Court. This appears to be an attempt to introduce into this country a branch of the equitable jurisdiction of the Court of Chancery, which can only be exercised where there are two distinct systems of law obtaining as in England.

The Agra Bank ought not to be allowed now to urge the same grounds which they might have put forward when called upon to

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show cause against the substitution of their names in place of the judgment-debtors—see *Protherro* vs. *Forman*, 2 Swanst., 227.

[AINSLIE, *J.*—Why did not the Bank appeal?]

Evans.—There is no appeal against an order made under section 208 of Act VIII of 1859.

Baboo *Rashbehary Ghose.*—It does not follow that, because there was no appeal, the order can now be set aside by a regular suit. If the order were wrong, the Bank might have applied for a review.

I contend (1) that the order is final, and that the other side must show some provision of the Legislature enabling them to bring a regular suit to set it aside; and (2) that, supposing a suit for an injunction will lie, that the plaintiff has so contributed to his being placed on the position which he now finds himself, that he is not now entitled to relief—see *In re Cochrane*, 14 B. L. R., 330, and Kerr on Injunctions, pp. 17 and 22.

[GARTH, *C.J.*—You must bear in mind, that the Bank might have been in exactly the same position if it had appeared, and yet the Judge had made the same order.]

[AINSLIE, *J.*—There is no provision in the Code, except in section 210, for the substitution of the names of judgment-debtors, and that section cannot apply in this case. So that the order is bad on the face of it.]

The case of *Lalla Poorikit Lall* vs. *Mussamut Sabeerun*, 7 W. R., 368, where the assignee of the judgment-debtor was put on the record, shows that this order was not made without jurisdiction —see *Pogose* vs. *Dishkoon Waris Calchuck*, 2 C. L. R., 278.

Woodroffe.—Neither in section 208 nor 210 is it provided that the person coming in under these sections shall be put on the record.

[JACKSON, *J.*—Although the word decree-holder is nowhere defined by the old Code, the "original decree-holder" is spoken of in section 216, so that the Code seems at least to have contemplated another person becoming decree-holder.]

But section 216 does not call upon the heir or representative of the original party to suit to show cause why he should not be made a party, but why the decree should not be executed against him.

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The order on the face of it appears to be an absolute nullity, for it could be made neither under section 208 nor 210.

Moreover the order was open neither to appeal nor review, but whether it had or had not been so open, it was an order under which nothing, according to the case of *Abedoonissa Khatoon* vs. *Ameroonnissa Khatoon*, L. R. 4, Ind. Ap. 66, could be done.

[GARTH, *C.J.*—I am not sure that it was not open to review. Suppose the Judge had made an entire mistake, wouldn't he have been allowed to recall his order?]

In one sense every Court has a power of review, but the question here is whether such a power exists in matters not arising between the parties to the suit. The case of *Abedoonissa Khatoon* vs. *Ameroonnissa Khatoon* clearly lays down that nothing could be decided here by a review, and that case was followed by WHITE and MITTER, *J.J.*, in *Sooba Beebee* vs. *Fukurunnissa Begum*, 1 C. L. R., 331.

The case of *Pogose* vs. *Beebee Dishkoon Waris Calchuck*, 2 C. L. R., 278, is an express authority for saying that there is no appeal from an order under section 210.

The injunction asked for here was granted under similar circumstances in the case of the *Agra Bank* vs. *Moharani Brojosundery Debi*, Reg. App. 121 of 1876, (unreported.)

As to whether this suit will lie, see the remarks of JACKSON, *J.*, in the case of *In re Cochrane's* petition, 14 B. L. R., 337.

With reference to the question of liability, it has been held that a judgment-creditor who sets a Sheriff, who has no jurisdiction, in motion, is liable at the suit of the judgment-debtor—*Dorab Ally Khan* vs. *Executors of Khajah Moheeooddeen*, I. L. R., 3 Cal., 806.

[GARTH, *C.J.*—That was under very peculiar circumstances.]

With reference to the question of limitation, the Subordinate Judge held that the order we have to consider was an order in a proceeding other than a suit, and that the period of limitation applicable was one year under Art. 15 of Sch. 2 of Act IX of 1871. Now this suit does not resolve itself into a suit to set aside an order. We pray that "it be declared that the order is

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wholly illegal," so that it would be quite sufficient to have a declaration that the order was illegal.

[GARTH, *C.J.*—It seems sufficient for the purposes of your case for the Court to decree a perpetual injunction, restraining the defendants from issuing execution against the Agra Bank.]

I would point out that MARKBY, *J.*, has confused injunctions for staying proceedings, and injunctions to an individual to prevent him from executing a decree obtained by him. This is an important distinction—see Broughton's Civil Procedure Code (Act X of 1877), App. p. ccxxxii.

Evans (*on same side.*)—In the first place I contend that on principle no order could have been made as this was, without an adjudication as to whether the Bank was liable or not. The case of *Abedoonissa Khatoon* vs. *Ameroonnissa Khatoon* shows that there could have been no adjudication under the circumstances. The only means by which an adjudication could be had in this matter was by bringing a suit. The old Code of Civil Procedure, Act VIII of 1859, provided that all matters, not excepted by section 2, might be tried by suit.

If then a suit would lie, it was the duty of the Judge meanwhile to restrain proceedings in his own Court, pending the hearing of this suit.

Further I contend that the order is not merely erroneous, but a nullity, and if so that I am entitled to an injunction.

Baboo *Rashbehary Ghose*, in reply.

The judgment of the Court (1) was as follows:—

A review having been granted in this case, upon the ground that the previous judgment of this Court contained an inaccurate statement of the facts, and that a review was necessary for purposes of justice, we are now called upon to decide a second time the appeal which has been preferred from the judgment of Mr. Justice WHITE, whose opinion in the Division Bench prevailed over that of Mr. Justice MITTER.

Messrs. Gilmore, Mackilligan & Co. were the proprietors of an Indigo business, called "the Paikurdanga Concern," over which

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the Agra Bank held a mortgage. One of the properties belonging to that concern was a putni talook called Kolabaria, of which Brojo Nath had the durputni. The rent of this putni talook not being paid, it was sold under the provisions of Regulation VIII of 1819; and in consequence of that sale, Brojo Nath's durputni rights were cancelled.

Brojo Nath then brought a suit against a number of persons, including the executors of the deceased members of the firm of Messrs. Gilmore & Co. for the damage which he had sustained by the cancellation of his rights; and he obtained a decree on the 3rd of June 1867 for money to be realized from the estate of the original putnidars.

This decree was sold to one Giridhur Sen, the predecessor in title of the present defendants.

On the 11th of August 1869 the executors of Mr. J. P. Mackilligan, the last survivor of the firm of Gilmore & Co., sold the Paikurdanga Concern with *dena* and *powna* to the Agra Bank, the present plaintiff.

In 1871 Giridhur Sen applied to the Court, in which the decree for damages had been passed, to substitute the Agra Bank in the place of the original judgment-debtors, on the ground that the Bank had purchased the right of the Paikurdanga Concern with *dena* and *powna*, and were consequently liable to pay the amount of the decree. A notice of this application was served on the Manager of the Bank, but he being advised that the Court could not possibly grant the application, did not appear to oppose it.

The application, however, was granted; and the Agra Bank were substituted in the place of the judgment-debtors.

In December 1874 the defendants applied to execute the decree against the Agra Bank; and on this occasion the manager of the Bank opposed the application. This opposition, however, was overruled.

He then applied to this Court, under section 15 of the Charter Act, to set aside the order under which the Agra Bank was substituted for the original judgment-debtors, on the ground that the Court had no jurisdiction to make such an order; but this application was refused.

The Agra Bank then brought this present suit, praying that the

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order of substitution might be declared illegal; that the proceedings taken upon it should be set aside, and that the defendants should be restrained from taking proceedings upon it against the plaintiffs.

The defendants contended:—

1*stly*.—That as the plaintiffs' object was in effect to set aside the order of the 21st of June 1871, and as the suit was not brought within a year from that date, the plaintiffs were barred by limitation (see Article 15, Sch. 2, of Act IX of 1871.)

2*ndly*.—That as the plaintiffs had not appeared to urge this objection in the execution proceedings, they had no right to do so by a regular suit.

3*rdly*.—That as the Agra Bank were the mortgagees in possession of the putni talook, which was sold for arrears of rent, it was through their default that the putnee talook was sold, and the durputnidar's interest cancelled.

4*thly*.—That as the Agra Bank had become the owners of the business carried on by Gilmore & Co. with *dena* and *powna*, they were liable to satisfy the decree obtained by the defendant's ancestor against Gilmore & Co.

The Subordinate Judge in the Court of First Instance held that the plaintiffs' claim was barred by limitation; and also, that the plaintiffs as assignees of Gilmore & Co., had become liable to pay the amount of the decree.

He consequently dismissed the plaintiffs' suit, and on appeal to this Court the Judges of the Division Bench differed in opinion; Mr. Justice MITTER substantially agreeing with the Court below, and MR. Justice WHITE deciding that in point of law the plaintiffs were not liable for the amount of the decree, and that they were entitled to an injunction, restraining the defendants from taking further proceedings to enforce that decree.

The opinion of Mr. Justice WHITE, being the senior Judge, prevailed.

An appeal was then preferred from his decision, and the Appellate Court, as originally constituted, allowed the appeal, but a review has been granted, and we have now heard the case re-argued.

We have already expressed an opinion during the argument, that the Agra Bank were not liable to the present defendants for the amount of the decree. That decree, as it seems to us, had nothing to do with the debts of the Indigo concern. The Agra Bank was in no sense the representative of Gilmore and Co., and the Subordinate Judge had no right, whatever, to substitute the Bank in the place of the original judgment-debtors.

The only points upon which we have entertained the least doubt, are:—

1*stly*.—Whether the Agra Bank, having neglected to appear in the execution proceedings, and to urge their objection to the order then made by the Court, can now maintain this suit, for the purpose of relieving themselves from the effect of that order; and

2*ndly*.—Whether the suit is barred under Article 15 of the Limitation Act, not having been brought within a year from the time when the order was made.

We are of opinion, that the plaintiffs in this suit are entitled to be relieved from the effect of the order in question.

That order has been made under such circumstances that the plaintiffs have no means by any proceeding which they might take in the former suit, of setting it aside or of preventing the defendants from enforcing it. It is true, that in the first instance, they had an opportunity of objecting to its being made; but inasmuch as they were not in any sense the representatives of the judgment-debtors, they had certainly good reason to suppose that the Judge would not have made such a mistake as to substitute them in their place.

Then the order having been once made, they had no right of appeal against it; and they took the only means in their power of negativing its effect: *first*, by objecting to the application, which was made by the defendants to enforce it by execution; and, *secondly*, by applying to this Court, under section 15 of the Charter Act, to set aside the order upon the ground that the Court had no right to make it.

Both these attempts having failed, this suit is now the only means by which they can prevent the defendants from making an inequitable use of the order which they have unjustly obtained; and the proper object of the suit is, not to set aside the

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order, but to restrain the defendants by injunction from enforcing it.

The principle laid down in Daniell's Chancery Practice, 3rd Edition, page 1218, is this: "It is a general rule, illustrated by an abundance of cases, that wherever a party by fraud, accident, mistake, or otherwise, has obtained an advantage in proceeding in a court of ordinary jurisdiction, which must necessarily make that Court an instrument of injustice, a Court of Equity will interfere to prevent a manifest wrong by restraining the party, whose conscience is thus bound, from using the advantage he has gained."

And in Drury on Injunctions, page 96, where the same subject is discussed, it is said:—

"Upon this principle it seems immaterial where or what the Court is, in which the proceedings are sought to be restrained, provided the party sought to be restrained is amenable to the jurisdiction, and is capable of being acted on by the process of contempt of Court; and the extension of the jurisdiction of equity to stay proceedings in other Courts, besides Courts of Common Law, and in foreign Courts, as well as in Courts within the jurisdiction of the Court of Chancery, becomes, when considered in reference to the principle stated, as rational and intelligible, as it is firmly established in practice." (See also Story's Equity Jurisprudence, sections 899 and 900.)

Acting upon this principle, we quite agree with Mr. Justice WHITE, that although the order of the 21st of June cannot itself be set aside in this suit, the defendants ought to be restrained by a perpetual injunction from taking any further proceedings upon it as against the plaintiffs.

In the view which we have taken of the case, there is, of course, no ground for the objection, founded on Article 15 of the Limitation Act. Our judgment will not have the effect of setting aside the order in the former suit; it will only be binding upon the defendants personally. It will prevent them from unjustly and inequitably availing themselves of an order, which was to some extent the result of their own mistake, and certainly of error on the part of the Court who made it.

The appeal will, therefore, be dismissed, and the appellants will pay to the respondents the costs of both hearings.

[CIVIL APPELLATE JURISDICTION.]

BRINDABUN CHUNDER SIRCAR CHOWDHRY . . . . . } (DEFDT.) APPELLANT;

AND

DHANAUJOY LUSKAR . . . (PLAINTIFF) RESPONDENT.

1879 *May 16th.*

No. 1977 of 1878.

Res judicata—Act VIII (B.C.) 1869, *section* 27—*Plaint, Proof of title alleged in—Variance.*

A suit brought by the plaintiff in December 1875 on an alleged mocurrari pottah to recover possession, with mesne profits, of certain jamai lands of which he had been dispossessed in Pous 1278, having been dismissed, as barred by section 27 of Act VIII (B.C.) of 1869, the plaintiff, in September 1877, instituted a fresh suit on same cause of action for possession, with mesne profits, of the same lands, it was found by the lower Courts that the alleged pottah was invalid; but that apart therefrom the plaintiff had acquired a right of occupancy and was entitled to possession.

Held, that inasmuch in the first suit the plaintiff's cause of action was not heard and determined the present suit was not *res adjudicata*.

Held, further, that having failed to prove his title under the pottah, the plaintiff was not entitled to a decree on the strength of a right of occupancy which he had established, but which he had not claimed in his plaint.

Bijoya Debia vs. *Bydonath Deb*, 24 W. R., 444, cited and followed.

APPEAL from a decision passed by the Additional Judge of the 24-Pergunnahs, affirming the decree of the Subordinate Judge of that District.

The plaintiff in this suit claimed to recover possession, with mesne profits, of four holdings.

As regards the first three holdings the Court of First Instance found that the pottahs under which the defendant claimed were genuine documents, but that the naib who executed them had no authority to grant them; that the plaintiff had nevertheless acquired under them a right of occupancy; and that he was entitled to recover possession of these holdings with the exception of particular plots claimed by certain ryots who intervened and were made parties to the suit.

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Judgment.

The proof of title to the fourth plot by purchase from the wife of one Ram Kishore was also held to have failed, but the plaintiff was found to have acquired, in that likewise, a right of occupancy. A decree was given accordingly.

On appeal the District Judge affirmed the decree, being of opinion that there was nothing inconsistent in the title by right of occupancy with that claimed in the plaint under the pottahs and deed of sale.

The principal defendant thereupon preferred a second appeal to the High Court.

Baboo *Rash Behary Ghose*, and Baboo *Sharoda Churn Mitter*, for Appellant.

Baboo *Byddo Nath Dutt*, for Respondent.

The following judgments were delivered by the Court (1) :—

JACKSON, *J.* JACKSON, *J.* :—

In our opinion the plaintiff's suit ought to have been dismissed.

He claimed to recover possession of jamai land, by adjudication of jamai right thereto, together with mesne profits, and the ground of the suit was, that he had obtained a mourosi pottah under the signature of the naib of the zemindar. The suit was brought in *formâ pauperis*, and the plaintiff prayed for a decree for the recovery of possession by adjudication of tenancy right, and for mesne profits.

It appears that, according to the plaint, the plaintiff had been dispossessed, not by the present zemindar, but by his predecessors, in the year 1278. In the year 1281 the zemindary right of one of the co-sharers, defendant No. 2, was acquired by another co-sharer, defendant No. 3, and it is now said the defendants Nos. 1 and 3 are wrongfully keeping the plaintiff out of possession of his jamai rights. The suit, therefore, is as against defendants Nos. 1 and 3, who are zemindars, and against defendant No. 2, who assisted the zemindars for possession of the lands as aforesaid.

It seems that a first suit was brought on this cause of action on the 9th December 1875, which was dismissed after hearing on

(1) JACKSON and MCDONELL, *JJ.*

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Judgment.

JACKSON, *J.*

the 8th May 1876, on the ground that under section 27 of Act VIII (B.C.) of 1869, the suit ought to have been brought within one year from the time of dispossession, and not having been so brought, it was barred by limitation. This, therefore, was a second suit upon the same cause of action.

The defendants set up limitation, *res judicata*, and also, as I gather, a denial of the plaintiff's mokurarri, for although the written statement says nothing of the kind, being rather in the form of a petition against the plaintiff being allowed to sue in *formâ pauperis*, we are told that another written statement was afterwards put in, which is not before us now, and in that written statement, apparently the plaintiff's alleged mokurarri tenure was denied by the defendants. The present suit included a much larger claim for mesne profits, and was therefore instituted in the Court of the Subordinate Judge.

It was held by that Court that, although the plaintiff did not acquire a valid mourosi and mokurarri interest by virtue of his pottahs, he was entitled to recover possession as he had acquired a right of occupancy, and that right was not legally determined. Accordingly the plaintiff got a decree for possession with wasilat for three years next preceding the suit.

On appeal to the District Judge, this judgment was in substance affirmed, and one of the defendants appeals to this Court, and complains in the first place that the plaintiff's suit ought to have been thrown out under section 2 of the Code of Civil Procedure, Act VIII of 1859.

On this point we do not think that the appellant is right. It seems to us that, inasmuch as the Moonsiff considered that the first suit had been brought after the period limited by law, and that, consequently, it was not open to him to enter into the merits of it, in truth the cause of action had not been heard and determined by a competent Court. Whether the decision of the Moonsiff took the form of a dismissal of the suit or otherwise does not appear to make any difference. The plaintiff, if his suit was now in time, was entitled to have his cause of action heard and determined which had not been heard in the previous suit.

The question remains whether the plaintiff had a cause of

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action, and whether he had brought it in the proper time. It appears that in the judgment of both Courts he failed to make out any valid mourosi mokurarri title, but then the Courts concur in thinking that he was entitled to recover under the right of occupancy. It was a point taken, not in the memorandum of appeal, but at the hearing before the lower Appellate Court, that the plaintiff having failed to establish the jamai title which he had set up, ought not to succeed on the strength of a right of occupancy. This objection was over-ruled by the lower Appellate Court, but we find that in a very singular case before the present Chief Justice and my brother MCDONELL, in 24 W. R., p. 444, Bijoy Debia against Byddonath Deb, such a ground of appeal was held to be valid. The learned Chief Justice says:—"The claim of the plaintiff's is simply to obtain a declaration of their title to the land under a mokurarri lease which they set up. The issues in the case were framed with a view to ascertain the existence and genuineness of this particular lease and title, and it seems to us that the judgment of the lower Appellate Court, negativing the leasehold interest claimed by the plaintiffs, but investing them with an interest of a different character which they never claimed, is erroneous, and that if we were to confirm this judgment, we should be conferring upon the plaintiffs a totally different thing from that for which they brought their suit."

It appears to me that a plaintiff suing to recover possession of land as held under a mourosi mokurarri title, and claiming wasilat in respect thereof, not only from the present zemindars, but also from persons who dispossessed him, must bring a suit of an entirely different character from that of a ryot suing his landlord for the recovery of possession of land in which he has a right of occupancy, and if the plaintiff, in the first-mentioned kind of suit, fails to make out his allegations, he will clearly not be entitled to fall back upon a cause of action of an entirely different kind. Now, the cause of action which the plaintiff did make out in the present case was simply a right to be in occupancy of the land from which he was ejected, and that it seems to me was an injury, the remedy for which is referred to in section 27 of Act VIII (B.C.) of 1869, and must be claimed within one year from the date of ouster.

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Judgment.

The pleader for the respondent in this case appears to consider that there is an analogy between the rights of a tenant who, by holding land and paying rent for it for twelve years, acquires a right of occupancy, and the title of a person who, by twelve years' adverse possession, extinguishes the rights of the previous owner, and himself acquires a title by prescription.

It appears to me that there is no analogy between the two cases. The right, if any, which the plaintiff had in the present case, is created entirely by his continued occupancy of the land. It does not rest upon any grant; it is not, in general, transferable, and it appears to me that, if the tenant desires to maintain that right, and to have himself replaced in the possession which he occupied before ouster, he is bound to bring a suit under section 27 of Act VIII of 1869 within one year from date of dispossession. I think, therefore, that the plaintiff's suit in this case ought to fail, and that the judgments of the Courts below ought to be reversed, and the plaintiff's suit dismissed with costs.

McDONELL, *J.*:— McDONELL, *J.*

I concur.

[CIVIL APPELLATE JURISDICTION.]

1879
19th May

No. 201 of 1878.

SURUT SUNDARI DABIA. . (PLAINTIFF) APPELLANT;

AND

ANUND MOHUN GHUTTUK AND OTHERS . . . . . (DEFENDANTS) RESPONDENTS.

Enhancement of rent—Apportionment of rent under Butwara Proceedings—Butwara—Act VIII (B.C.) of 1869, *section* 17, *Meaning of "taluq" under—Taluq apportioned by Butwara.*

In answer to a suit for enhancement of rent by the plaintiff as owner of an undivided share in a certain zemindari, allotted to him under butwara proceedings more than 20 years previously, the defendants contended that the taluq, the rent of which it was sought to enhance, had been held by them for upwards of 20 years at a fixed rent, and consequently, under section 17 of Act VIII (B.C.) of 1869, was *primâ facie* not liable to enhancement. It was found that in 1861, the owner of another undivided share, under the same butwara, had brought a suit for enhancement and obtained a decree.

Held, that the "taluq" intended by section 17 of Act VIII (B.C.) of 1869 was the original taluq, and, therefore, the defendants, unless they could show that the rent of that taluq had remained unchanged, either in its original entirety, or apportioned, as it had been under the butwara, were not entitled to the benefit of that section.

Durga Pershad Myti vs. *Joy Narain Hazra*, 2 C. L. R., 370, distinguished.

APPEAL from a decision passed by the Judge of Zillah Mymensing, reversing the decree of the First Subordinate Judge of that district.

Baboo *Srinath Das*, and Baboo *Mohini Mohun Roy*, for the Appellant.

Baboo *Chunder Mahdub Ghose*, for the Respondents.

The facts are sufficiently set forth in the following judgments of the High Court (1):—

GARTH, C.J. GARTH, *C.J.*:—

This is a suit by the zemindar to enhance the rent of a 10 annas share of the defendant's taluq.

(1) GARTH, *C.J.*, and PRINSEP, *J.*

The only defence, which it is necessary for us to consider, is, that the taluq in question has been held at a fixed rate of rent from before the time of the permanent settlement.

The lower Court has found that the 10 annas share, which it is sought to enhance, has been held at a fixed rent of Rs. 510-13-5 for the last 20 years, and consequently that the rent cannot be enhanced.

An objection has been taken by the plaintiff, (the appellant) that the evidence upon which the lower Court has found this fact is insufficient in point of law; but we think that there was some evidence to justify the finding, and that the sufficiency of it was a question for the Court below.

There are, however, other circumstances in the case, which raise an important point of law, and to which the Judge does not appear to have attributed their due weight.

It appears that upwards of 20 years ago, the zemindari, under which the taluq was held, was partitioned under a butwara. There was no division made of the area of the villages which constituted the taluq, but it was partitioned into three undivided shares, which were respectively allotted to each of the three zemindars between whom the butwara was made,—a 10 annas share to one, a 4 annas share to another, and a 2 annas share to the third.

The defendants, the taluqdars, continued to hold the entire property, as they had done before; but the rent being thus apportioned by law, the defendants from that time paid the apportioned rent severally to each of the parties entitled to it.

It then appears that, in March 1861, a suit was brought against the defendants to enhance the rent of the two annas share, the result of which was, that the rent of that share was enhanced. And it also appears, that the plaintiff herself brought a suit in April 1863, to enhance the rent of the 10 annas share, and that a decree was obtained in the Court below for enhancement, although the High Court on appeal reversed the judgment, not because the enhancement was improper, but on the ground that the plaintiff was a minor, and had no right to sue otherwise than by a guardian.

In neither of these cases, so far as appears, did the defendants show that they had a right to hold at a fixed rent.

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SURUT SUNDARI DABIA v. ANUND MOHUN GHUTTUK.

Judgment.

GARTH, C.J.

Then comes the question, whether, having regard to the fact of the rent of the two annas share having been then enhanced in the year 1861, it can be said, that the defendants, although they have held the 10 annas share at a fixed rent for 20 years before suit, are entitled to the benefit of section 17 of the Rent Law.

The Judge seems to consider that the plaintiff cannot take advantage of the enhancement of the rent of two annas share because she was no party to the decree. But we think that the fact of the plaintiff having been no party to the decree makes no difference in that respect. The defendants were parties to the decree; and as against them, the decree shows clearly, that the rent was enhanced.

Can then the defendants say in the face of that decree, *that the rent of their taluq has not been changed for a period of* 20 *years before suit?*

In order to determine this question, we must first see what the meaning of the word "taluq" is in section 17. The Judge apparently considers it to mean, not the original taluq, the rent of which has been divided, but the 10 annas share of that taluq, which, by means of the butwara, has now become a separate tenure; because he finds that the rent which has remained unchanged for 20 years, is the sum of Rs. 510-13-1, which is the apportioned rent of the 10 annas share.

But this view, we think, is not only erroneous in point of law, but it is one which, if it were correct, would not entitle the defendants to the benefit of section 17; because, assuming the 10 annas share to be the "taluq" intended by that section, it is plain that it has only existed since the time of the butwara,—and not from the time of the permanent settlement.

We have no doubt that the "taluq," which is intended by section 17, is *the original taluq* which is now divided; and we think that if the defendant could show that the rent of *that taluq* had remained unchanged, either in its original entirety, or apportioned, as it has been under the butwara, they would be entitled to the benefit of the section.

The apportionment effected by the butwara was for the benefit of the zemindars; and so long as the apportioned rents contin[illegible]

to amount in the aggregate to the rent of the original taluq, it would be obviously unjust that the defendants should be placed in a worse condition by the result of the butwara proceedings.

But looking at the question in this light, it is impossible for the defendants to say that the rent payable for the original taluq has remained unchanged during the last 20 years; because the enhancement of the rent of two annas share has of course also enhanced the rent payable for the whole taluq.

Judgment.

GARTH, *C.J.*

We think, therefore, that the judgment of the lower Court is wrong in this respect, and that the defendants are not entitled to avail themselves of section 16 or 17 of the Rent Law.

But then we have had some doubt, whether, under the circumstances of this case, the rule laid down by the Full Bench of this Court in the case of *Durga Pershad Myti* vs. *Joy Narain Hazra*, (2 C. L. R., 370) would not debar the plaintiffs from obtaining the enhancement which they claim. If it did not operate as a bar, of course there would be no use in sending the case back to the lower Court.

But we think that the rule laid down in that case is not applicable to this.

There the arrangement for payment of the rent to the several shareholders did not put an end to, or affect the original lease of the entire tenure. Here, on the other hand, the butwara proceedings did effect such a complete change in the nature of the original tenure, as to create three new tenancies in the place of the old one.

The judgment of the lower Court will, therefore, be reversed, and the case will be remanded to that Court, in order that the question of enhancement may be tried upon the merits.

The appellants will have their costs in this Court.

PRINSEP, *J.*:—

PRINSEP, *J.*

I entirely agree in this judgment. I would only add that, though I am bound by the terms of the judgment of the Full Bench referred to, I do not altogether concur in the view taken.

[CRIMINAL REVISIONAL JURISDICTION.]

1879 *June 12th.*

No. 126 of 1879.

BURODA KANT ROY, ... PETITIONER;

AND

KORIMUDDI MOONSHEE AND OTHERS . . .

Criminal Procedure Code (Act X of 1872) sections 328 and 491—Evidence recorded partly by one Magistrate and partly by another.

Notwithstanding the introduction into the section of the words "the accused person" and "conviction," the provisions of section 328 of the Criminal Procedure Code apply to an enquiry instituted under section 491, with a view to enforcing the giving of security against a breach of the peace, and in such a case where the Magistrate, by whom only part of the evidence has been taken, is succeeded by another Magistrate while such enquiry is pending, the person called upon to show cause why he should not give security, may insist, before the latter, upon the recall and re-examination of the witnesses whose evidence has been already taken by the former Magistrate.

IN this case the petitioner moved the High Court under the circumstance which will be found set out in the judgment of that Court, to set aside an order made under section 491 of the Code of Criminal Procedure.

Baboo *Doorga Mohun Dass* appeared for the Petitioner.

The judgment of the Court (1), which was as follows, was delivered by

WHITE, *J.*

WHITE, *J.*:—

This is an application to set aside an order made under section 491 of the Criminal Procedure Code, directing Buroda Kant Roy to give security against a breach of the peace. A summons under that section was issued by a Deputy Magistrate named Baboo Kristo Chunder Roy, and he examined three witnesses, and the case had arrived at the stage at which the petitioner had to be called upon to show cause, when Baboo Kristo Chunder

(1) MORRIS and WHITE, *J.J.*

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BURODA KANT ROY v. KORIMUDDI MOONSHEE.

Judgment.

WHITE, *J.*

Roy was transferred, and the present Deputy Magistrate was appointed in his place. Afterwards Buroda Kant Roy, who had been duly summoned to show cause, appeared by his Mooktear and applied that the witnesses for the prosecution should be re-summoned and re-heard under section 328. This request the present incumbent in office did not comply with, but proceeded to hear the defence without re-summoning and re-hearing the witnesses, and then made the order complained of.

The petitioner urges that the order should be set aside, on the ground that the requirements of section 328 of the Criminal Procedure Code have been disregarded.

The Deputy Magistrate in his explanation says that, "Buroda Kant Roy's Mooktear might have asked me to re-summon and re-hear the witnesses, but I do not remember that he did so."

The Deputy Magistrate having no recollection on the subject, we think we must give effect to the affidavit of the petitioner, and hold that the application was made and refused. And the probability is strongly in favor of our conclusion; for it appears from the further explanation offered by the Deputy Magistrate that he considered that the application was not one which the petitioner was entitled to make, for the Deputy Magistrate says that section 328, according to the view which he takes of it, does not apply to the case of an enquiry into the giving of security, because the words used in the first proviso are "the accused person," and in the second proviso, "conviction."

The first observation that arises upon the above explanation is this: If section 328 did not apply to the case then before the Deputy Magistrate, it was his duty, according to the ordinary principles which regulate the adjudication upon evidence, and the administration of justice, to recall the witnesses himself, and to take their evidence again from the beginning. He could only be relieved from performing that duty on the ground that section 328 of the Code of Criminal Procedure, applied to the case before him. We think, however, that section 328, notwithstanding the introduction of the words referred to by the Magistrate as a reason for a contrary construction, does not really apply as much to an inquiry having in view the giving of security against a

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Judgment.

WHITE, *J.*

breach of the peace, as to a trial of a party who may be accused of an offence. In the body of the section the direction is general, that the Magistrate is to adopt the procedure prescribed in that section whenever a case is before him in which part of the evidence has been heard by his predecessor. Section 491 directs that an enquiry into giving security shall be adjudicated upon evidence. Upon such an enquiry, the party brought before the Magistrate is in substance "accused" of being likely to commit a breach of the peace, or of doing an act which is likely to produce a breach of the peace. And if the Magistrate finds that he is, the order which the Magistrate makes directing him to give security is in substance a conviction, though different in its form and effect. The reasons for adopting the procedure of section 328, when there has been a change of officers pending the enquiry, are just as strong in the case of an enquiry into giving security as they are in the case of an enquiry into an offence. And I may repeat that the only result of our coming to the conclusion that section 328 does not apply to a case like the present one, would simply be to compel the Magistrate in this, and all similar cases, to commence the enquiry afresh. We are, therefore, of opinion that section 328 did apply, and that the Magistrate was bound in this case, upon a demand by Buroda Kant Roy, to re-summon and re-hear the witnesses who had been heard by his predecessor, and that not having been done, his adjudication of the case is not in accordance with the provisions provided by the Criminal Procedure Code.

The rule is made absolute, and the Magistrate's order is set aside.

[CIVIL APPELLATE JURISDICTION.]

SHEIKH OMUR ALI AND ANOTHER . . . . . } (PLAINTIFFS) APPELLANTS;

AND

SHEIKH WEYLAYET ALI AND 70 OTHERS . . . . . } (DEFENDANTS) RESPONDENTS.

1879
June 11th.

No. 11 of 1878.

Multifariousness—Joinder of Parties.

At an auction sale for arrears of rent, on the 11th July 1865, plaintiffs purchased a tenure which, on the zemindar's *seristah*, stood in the name of one Sheikh Meajan, and proceeded to take steps to obtain possession, but were resisted by the defendants. Against one of the defendants who claimed a particular portion of the lands under the tenure in question, they brought a suit in 1869; but this suit was finally dismissed in June 1876, on the ground that all the persons, who were claimants of any part of the lands, ought to have been joined as defendants. Accordingly, a fresh suit was brought against all the claimants of the tenure. To this suit the defendants set up various and distinct defences, some alleging one defence and some another, and so on. The Subordinate Judge dismissed the suit for multifariousness. *Held*, that there was no multifariousness, the plaintiffs' claim being to recover possession against persons, who were alleged to be joint trespassers.

REGULAR APPEAL from a decision of the Subordinate Judge of Purneah.

Baboo *Mohiny Mohun Roy*, and Baboo *Taruk Nath Palit*, for the Appellants.

Mr. *C. Gregory*, Mr. *H. E. Mendies*, and Baboo *Anund Gopal Palit*, for the Respondents.

The facts are sufficiently set forth in the judgment of the Court (1), which was as follows :—

This suit was brought by the plaintiffs under somewhat peculiar circumstances.

A tenure called Jagir Teghuria, (which was held under the zemindari of Messrs. Morgan, Hayes, and Doong) was sold in

(1) GARTH, *C.J.*, and PRINSEP, *J.*

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Judgment.

the year 1865, under a decree, which had been obtained by the zemindars for arrears of rent.

On the 11th of July 1865, the plaintiffs, conjointly with Mussamut Nono Bai, purchased the property at this sale, and soon after the purchase was completed, the plaintiffs and Mussamut Nono Bai proceeded to take steps to obtain possession of it.

The plaintiffs' case is, that from that time to the present they have been endeavouring, by making settlements with the tenants, and in other ways, to possess themselves either of the land itself, or of the rents; but the tenure extends over 20 different villages, and the plaintiffs say that the defendants, to the number of 60 or 70 persons, have, in collusion with one another, combined, in various ways, to keep them out of their property, and have hitherto succeeded in doing so.

One of the defendants, Sheikh Masibulla, brought a suit for arrears of rent in respect of 12 beegahs of one of the villages against a person called Golam Ali, who is said to be his creature and acting in concert with him. This led to the plaintiffs bringing a regular suit in the year 1869, for an adjudication of their rights against Sheikh Masibulla, and that suit after several years' litigation was decreed by the District Judge in favor of the plaintiffs; but an application for review was afterwards made by the defendant, and the case was eventually dismissed on the 21st of June 1876, upon the ground that the suit was brought against Sheikh Masibulla only, and should have been brought against all the persons who were claimants of the tenure.

The plaintiffs, accordingly, brought this suit against all the claimants of the tenure, who have combined, as they say, to oust them of their rights; and they have made the defendant, Mussamut Nono Bai, a party to the suit, as she has sold her interest in the purchase.

The defendants resist the suit upon various grounds. Some of them claim to hold adversely to the plaintiffs; some say that they have no interest in the tenure in question, and that they have done nothing to keep the plaintiffs out of possession; and the rest defend upon other grounds, but all unite in contending that the suit should be dismissed for multifariousness, because the plaintiffs should have sued each defendant, or set of defend-

ants, severally, instead of proceeding against them all in one suit.

The Judge in the Court below has taken that view. He says that the suit is bad for multifariousness; and if he is right, the plaintiffs are in no better position now than they were in the year 1869, when they sued Sheikh Masibulla alone for a declaration of their rights. Indeed, they would probably be in a much worse position; because, as the auction-purchase occurred so long ago as 1865, it is probable that any fresh suit which they might bring would now be barred by limitation.

We are of opinion that the plaintiffs are not placed in so unfortunate a position. It seems to us that the Subordinate Judge has determined the question of multifariousness rather with a view to the several answers which have been made by the defendants, than to the nature of the claim which is made by the plaintiffs. The plaintiffs' case was this: at the auction sale in 1865, they purchased the entire tenure in question, under a sale for arrears of rent. The tenure at that time stood in the zemindar's seristah in the name of Sheikh Meajan. The zemindar was not bound to look to any other than Sheikh Meajan for the payment of his rent; and when the rent was not paid, he had a right to sue Sheikh Meajan and to sell the entire tenure under his decree, whoever might in fact be in possession of the property.

No steps have been apparently taken for the last thirteen years to set aside this sale; and the plaintiffs had a right to consider that they had purchased the tenure free from encumbrances created by the prior holder; and they appear to have done everything which they might reasonably have been expected to do, to possess themselves of the property without force or litigation.

They tried to make settlements with the tenants; and occasionally succeeded in doing so. For a short time they appear to have received from some of them a few small sums by way of rent. But the tenants then repudiated the settlement, and the plaintiffs and their rights were virtually set at defiance.

Having regard to the plaintiffs' evidence, we cannot doubt that a number of persons, and amongst them some of the defendants, at any rate, have combined to possess themselves

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Judgment.

of the plaintiffs' property, and to resist their claims. It may be very difficult to find out who these people are, or whether they have any and what grounds for ousting the plaintiffs. But it is clear that they do not claim under the plaintiffs, and so far as appears, they all disclaim any community of interest with them.

Some say that the property which they hold is no part of the plaintiffs' tenure; some say that they have lakhiraj lands within the limits of the tenure; and others say that they possess interests derived from members of Sheikh Meajan's family. But whatever these several contentions may be, it seems to us that the plaintiffs' only course is to bring their suit against all the persons, who, as far as they can ascertain, are combining to keep them out of their property.

If a number of people take possession of A's house, and wrongfully exclude him from the enjoyment of it, A has clearly a right to treat them all as trespassers, and to bring a suit against them, jointly, for the dispossession, although some of them may in fact have taken possession of different rooms of the house to the exclusion of others, and although they may severally set up different pretexts for having dispossessed him.

It has been urged on behalf of the respondents that the plaintiffs are bound to state the precise time when they were dispossessed. But the obvious truth is, that they have never in fact been in possession; and the article in the Limitation Act, which applies to this case, is 138 and not 143. The plaintiffs say, that having bought the property in 1865, the defendants have from that time persistently excluded them from the enjoyment of it.

It may be that, when the case is tried upon its merits, it may turn out that some of the defendants have never taken possession of any part of the tenure; and if so, as against them it may be proper that the suit should be dismissed. Or, again, some of the defendants may be able to show that they are entitled to portions of the tenure by some rent-free title, which may make them independent of the plaintiffs. But this would be no ground for dismissing the plaintiffs' suit.

It would obviously be a cruel injustice, not to say an abuse of the process of the Court, if, under the circumstances disclosed by the plaintiffs' evidence, the latter were compelled to bring 60 or 70 different suits against 60 or 70 different persons of whose rights, if any, they know nothing; but who are combining, according to the plaintiffs' evidence, to keep them out of their rights.

The case must, therefore, go back to the Court below for a re-trial on its merits. It may very probably be that, in the event of the plaintiffs succeeding, some difficulty may arise to the extent of the liability of the different defendants, or in ascertaining the amount of mesne profits. But these are difficulties which may arise in any suit against several persons for a joint trespass; and the lower Court was not justified, because such difficulties may have been foreseen, in dismissing the suit for multifariousness.

The case will be remanded under section 351 of the Code of Civil Procedure, and the plaintiffs will be entitled to a return of the stamp fee on this appeal.

Considering the length of time that plaintiff has been endeavouring to obtain a decision of the Courts on his alleged rights, we think that the Subordinate Judge should fix as early a date as possible for the hearing of this case, and decide it on its merits without delay.

The costs will abide the ultimate result.

[ORIGINAL CIVIL JURISDICTION.]

1879 *April* 14*th*.
No. 278 of 1878.

A. B. MILLER . . . . . PLAINTIFF;

AND

BRINDABUN AND OTHERS . . . . . DEFENDANTS.

Small Cause Court Act, IX of 1850, *section* 58—"*Goods and Chattels*"—*Fixtures—Trade fixtures—Execution of Small Cause Court Decree.*

In execution of a decree of a Presidency Court of Small Causes, certain flour and oil mills, with a steam engine, boiler, and other machinery, were seized and sold. In a suit against the purchaser for damages for the removal of the same, it was *held*, that although the property seized and sold might, according to English law, be considered to be trade fixtures, and so seizable in execution for a tenant's debts, yet it did not come within the description "goods and chattels" used in section 58 of Act IX of 1850, and could not, therefore, be taken in execution of a Small Cause Court decree.

THIS was a suit by the Official Assignee as assignee of the estate of Hurronath, Woopendronath, Dependronath and Uttendronath Mozumdar, insolvents, for damages caused by the removal of certain oil and flour mills, and other machinery alleged to have been illegally removed by the defendants.

The plaintiffs' case is, that the insolvents carried on business in co-partnership, under the name and style of Woopendronath Mozumdar, and that the flour and oil mills belonged to the partnership.

The defendants justify the removal on the ground that they had purchased the property in question at an auction sale in execution of a decree obtained against Hurronath in the Calcutta Court of Small Causes in April 1878. They further allege that the partners formed a joint family, and that the debt upon which the decree was obtained was a joint debt incurred by Hurronath on behalf of all the partners.

No claim was preferred to this property by the Official Assignee until after the sale.

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MILLER v. BRINDABUN.

Argument.

J. D. Bell (Officiating Advocate-General) and *Bonnerjee*, for Plaintiff.

Hill and *Sale*, for the Defendants.

Bell contended that the questions to be considered were: (1) Was the seizure under the writ of the Small Cause Court legal? (2) If it was, could more than was shown to belong to the partner who was defendant in the Small Cause Court be seized and sold? And (3) had the attaching creditor priority over the Official Assignee?

Whether the property might or might not be called trade fixtures, it was not seizable in execution of a decree of the Small Cause Court. The words of the Small Cause Court Act, IX of 1850, were "goods and chattels," and it has been held that these words did not include fixtures—*Nattu Miah* vs. *Nandi Rani*, 8 B. L. R., 508; *Kally Persaud Sing* vs. *Hoolas Chund*, 10 B. L. R., 448.

As to the question of priority he referred to *Cochrane* vs. *Gladstone*, 2 Ind. Jur., N. S., 337, and *Anund Chundra Pal* vs. *Panchilal Surma*, 5 B. L. R., 691. The latter case might be relied upon by the other side, but it was a case which turned entirely on the wording of the sections of Act VIII of 1859, which had no bearing here, for Act VIII of 1859 was originally intended for the Mofussil, and no provision, therefore, was expressly made for the protection of the Official Assignee.

As to the remaining question, he contended, that inasmuch as execution proceedings were against the individual judgment-debtor, the purchaser, at a sale in execution of the decree, could only be entitled to the interest of that individual in the property sold.

Hill.—The cases of *Roy Chunder Roy* vs. *Bampton*, 2 Ind. Jur., N. S., 188, and *Anund Chundra Pal* vs. *Panchilal Surma*, 5 B. L. R., 567, show that on the date of attachment there was a right created in favour of the judgment-creditor, which takes priority of any right of the Official Assignee under a subsequent vesting order. The principle of these cases applies, *à fortiori*, to the present case, for our claim is made under what substantially amounts to a writ of *Fi-fa*—see the form of Warrant of Execu-

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tion in Small Cause Courts; see also *Aga Mahomed Ali Shiraji* vs. *S. E. Judah*, 7 B. L. R., 50.

The decisions quoted on this question, viz., whether the property seized comes within the words "goods and chattels," used in section 58 of Act IX of 1850, have reference only to tiled huts and not to fixtures, such as we have here.

The other side cannot contend that the property seized was not "goods and chattels," for if their contention be right, it would pass to the landlord to the exclusion of the Official Assignee.

Trade fixtures, I contend, which are removable by a tenant, come within the words of the Small Cause Courts Act, and may be taken in execution by a judgment-creditor—*Minshall* vs. *Lloyd*, 4 M. and W., 450, see p. 459; *Place* vs. *Fagg*, 4 M. & R., 277.

The facts show that this was not an ordinary partnership business. It was an ancestral joint business, and such a business is never treated as a business carried on by a number of individuals, or by one of them as agent for the others. The manager of such a business is more than a mere agent; he may alienate the joint property against the wishes of his co-sharers, and it is submitted that a decree against him as manager will be good against the joint effects, and that such joint effects may be sold in execution. No claim to this property, it must be borne in mind, was lodged until after the sale at which we became purchasers.

The following judgment was delivered by

WILSON, J. WILSON, J.:—

This is a suit brought by the Official Assignee, as assignee of the estate of Hurronath Mozumdar and others, his partners, to recover damages for the removal by the defendants of flour and oil mills, and a steam engine, boiler and other accessory machinery by which the mills were worked, all which had belonged to the insolvents.

The defendants justified the removal on the ground that they were purchasers of the things in question, at a sale in execution of a decree of the Calcutta Small Cause Court.

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Several objections to the validity of the sale and removal were raised. First it was said that such things were not goods and chattels within the meaning of section 58 of Act IX of 1850. Now I think it clear that the things in question bedded and fixed as they were, were what are called in English law fixtures, that is to say, so annexed to the soil that they could not be severed and removed without substantial disturbance of the soil, and substantial change in the character of the articles themselves. Indeed this was not seriously disputed. Then the case of *Kally Persaud Sing* vs. *Hoolas Chund*, 10 Beng. L. R., 448, is an express decision that the words "goods and chattels" in the section in question are used in their strict sense, and do not include fixtures. As in the earlier case of *Nattu Miah* vs. *Nand Ram*, 8 Beng. L. R., 508, it had been held that fixtures are not "movable" or "personal property" within the meaning of the Mofussil Small Cause Courts' Act. What is said in answer is, that, though those were fixtures, they were trade fixtures, such as according to English law a tenant might remove as against his landlord, and such as might be taken in execution in England for the tenant's debt, and I think they would be held trade fixtures under English law. But the only thing we are concerned with is the meaning of the words "goods and chattels" in the Calcutta Small Cause Courts' Act, and I can see no reason why the English doctrine as to the difference between trade fixtures and other fixtures should be imported into the matter. Nor am I aware of any authority for doing so. On the other hand, the decision of MACPHERSON, *J.*, in *Parbutty Bewah* vs. *Woomatara Dabee*, 14 Beng. L. R., 201, is an authority for saying that the question whether fixtures are removable by a tenant as against his landlord has nothing to do with the question whether they are seizable in execution as goods and chattels. I think, therefore, that on this ground the plaintiff is entitled to succeed.

The plaintiff further objected to the seizure and sale on the ground that on the facts of the case his title as assignee was a prior title to the defendants' under the execution. The plaintiff also objected to the removal of the goods, on the ground that the judgments of the Small Cause Court were against some of the insolvents only, and that even if the things were, in their nature,

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seizable, all that could be sold would be the interest of the judgment-debtors which would not justify the removal of the property.

As my opinion is in favour of the plaintiff upon the first question, it is unnecessary to say anything upon these two latter questions.

There remains the question of damages. The insolvent who was called valued the things at Rs. 14,000 or 15,000. But that is from his own evidence plainly an over-valuation and the plaint itself goes no higher than Rs. 12,000.

The Bailiff of the Small Cause Court, on the other hand, put the value as low as Rs. 4,000 to 5,000. But his valuation was with reference to a formal sale, and is of necessity too low I think. Rs. 8,000 is as well as I can judge the fair value. The decree will be for that amount with costs.

[CIVIL APPELLATE JURISDICTION.]

LOKI MAHTON AND OTHERS . . (PLAINTIFFS) APPELLANTS; 1879 *May 8th.*

AND

AJAIB LAL AND OTHERS . . . (DEFENDANTS) RESPONDENTS. No. 108 of 1879.

Act X of 1877, section 588 (w.)—Remand, Appeal from order of—Decree, Sale in Execution of—Right and Interest.

Where a case is remanded by the lower Appellate Court, and an appeal preferred against the order of remand, the High Court is not restricted under section 588 (*w.*) of the Code of Civil Procedure, to a consideration merely of the form of the order, but may examine it on the merits.

As to property which passes under a sale in execution of decree—*Nugender Chunder Ghose* vs. *S. M. Kaminee Dossee*, 11 Moore's I. A., 241; *Baijun Doobey* vs. *Brij Bhookun Lall Awasti*, L. R., 2 I. A., 275; *Deendyal Lal* vs. *Jugdeep Narain Singh*, L. R., 4 I. A., 247; *Doolar Chand Sahoo* vs. *Lall Chabeel Chand*, 3 C. L. R., 561; *Muddun Thakoor* vs. *Kuntoo Lall*, L. R., 1 I. A., 321; and *Ram Sahai* vs. *Sheo Prosad Singh*, 4 C. L. R., 226, cited and considered.

APPEAL from an order passed by the Subordinate Judge of Gya, reversing the decree of the first Sudder Moonsiff of that District.

In this case, a suit was brought to recover a share of a certain mocurrari right in respect of 4 annas of a mouzah known as Kathpara.

The plaintiffs alleged that their father, who was also the father of defendant No. 4, obtained the mocurrari in question, and had been in possession of the lands thereunder up to his death, when they and the defendant No. 4 came into possession, and held the lands jointly; that the first two defendants obtained a decree for arrears of rent against the defendant No. 4, and in execution thereof caused the right and interest of their judgment-debtor to be sold at auction; that the first defendant became the purchaser and dispossessed them (the plaintiffs) of the whole 4 annas.

The defendants urged that the defendant No. 4 was the manager of the joint family; that although the decree in satisfaction of which the share had been sold was formally obtained

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against the defendant No. 4 alone, yet all the members of the family were really bound; and that being so the whole right and interest of the family passed under the sale.

The Moonsiff gave a decree for the plaintiffs on the ground that it nowhere appeared in the former suit—from the decree, or the inventory or the proclamation of sale—that the plaintiffs were bound by the decree, or that more than the interest of defendant No. 4 passed to the purchaser. The other issue as to whether the debt, for which the property was sold, was incurred for the plaintiffs' benefit was not enquired into.

On appeal the Subordinate Judge, who was of opinion that these issues should have been tried, remanded the case for retrial, adding a fresh issue as to whether the family was joint or separate.

Against this order of remand, the plaintiffs appealed to the High Court.

Mr. *R. E. Twidale* and Baboo *Jadunath Sahai*, for the Appellants.

Baboo *Mohesh Chunder Chowdhry*, and Baboo *Amurendronath Chatterjee*, for the Respondents.

The judgment of the Court (1), which was as follows, was delivered by

AINSLIE, *J.*

AINSLIE, *J.* :—

The first question that arises in this appeal is the nature of the order which the Appellate Court will make under section 588, clause (w), of the Code of Civil Procedure, by which an appeal from an order under section 562 remanding a case is allowed.

It is contended that the only question which the Court has to consider is whether the remand order is in form such as is provided for by section 562; and that if it is formally correct, this Court is not at the present stage to enter into the merits of the adjudication on the preliminary point. But it appears to us that there is no such limitation in the Code: and that the intention of the Legislature was, that when the order remanding

(1) AINSLIE and BROUGHTON, *J.J.*

case is brought in review before this Court, the Court shall consider the propriety of that order in all respects, and if it is found that the order is defective, the party who had the benefit of a decree in the first Court shall retain that benefit. By section 629 of the Code it is provided in cases of an order for the admission of review of judgment that the order may be objected to by an appeal on certain limited grounds, namely, that it was in contravention of the provisions of sections 624 and 626, or was made after the expiration of the period of limitation prescribed therefor, and without sufficient cause, but not on any other ground. The fact that there is no such restriction in respect of the power of reviewing the remand order of an Appellate Court seems to show that it was not intended that the Court should limit itself to consider merely the form of the order: it is also authorized to examine it on its merits.

With reference to the merits of the case, the question merely comes to this: whether a person, who has purchased the rights and interests of the judgment-debtor, can be allowed to set up that the decree and sale under which he acquires title extended to the interests of others besides the judgment-debtor named.

There are several cases decided by the Judicial Committee which lay down a strict rule limiting the effect of sales where it does not appear on the face of the proceedings, that the judgment-debtor had been sued in a representative capacity; and, it is only in cases where it is manifest that the judgment-debtor must have been sued as a representative, that the Court has allowed a sale in terms of the interests of the judgment-debtor to convey the interests of other persons. The cases referred to, are in *Nugender Chunder Ghose* vs. *Sreemutty Kaminee Dossee*, 11 Moore's I. A., 241; *Baijun Doobey* vs. *Brij Bhookun Lall Awasti*, L. R., 2 I. A., 275; *Deendyal* vs. *Jugdeep Narain*, L. R. 4, I. A., 247; *Doolar Chand Sahoo* vs. *Lall Chabeel Chand*, 3 C. L. R., 561.

The case of *Muddun Thakoor* vs. *Kantoo Lall*, in L. R., 1 I. A., 321, is governed by a distinct principle. Although the debtors in that case were not necessarily sued in a representative capacity, the sons, who were contesting the sale made under the decree, were found to pay the debt covered by the decree, and the property

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which had been sold would have been liable in their hands to be seized and sold for it.

The case of *Ram Sahai* vs. *Sheo Prosad Singh*, 4 C. L. R., 226, decided by the Judicial Committee of the Privy Council on the 1st of February of the present year, only differs from this because it was established that the debt was one for which the sons were not liable, and the purchaser had taken with notice of their repudiation of it.

In the present instance the rights and interests of the fourth defendant only were sold, and there is nothing on the face of the decree to show that the other brothers were equally liable with him for the debt, or that the proceedings were taken against him in a representative capacity. Therefore, on the authority of the cases first referred to above, we must hold that the property of defendant No. 4 only passed by the sale, and that the Moonsiff was right in holding that, under these circumstances, it was not open to the defendant, who was the purchaser at that sale, to go into evidence to show that the debt was one for which a decree might have been obtained against the other brothers. Possibly it might have been so obtained, but if the judgment-creditor was content to take a decree against one brother in such a form that it did not bind the estate, the purchaser at the sale under that decree has no right to ask for more than what was attached and sold.

We, therefore, reverse the remand order made by the lower Appellate Court, and restore and affirm the judgment of the first Court with costs.

[CIVIL APPELLATE JURISDICTION.]

MOTHOORAMOHUN PAL CHOWDRY
(PLAINTIFF) . . . . . APPELLANT;

AND

RAM LALL BOSE AND ANOTHER (DEFENDANTS) RESPONDENTS.

1879
June 26th.

No. 571 of 1878.

Forfeiture—Ejectment, Right of—Act VIII (B.C.) of 1869—Equitable Relief against Forfeiture.

A seputni was granted to B by A, who held a durputni containing the following conditions, viz., "I shall pay rent month by month: should I fail in that I shall pay interest on instalments overdue at 1 per cent per month: I shall pay the rent in full by the close of every year: should I neglect to make the payments, you will, of your own authority, take over possession of the said durputni talook after the expiration of one month of the next succeeding year, and I shall have no complaint against your doing so."

Upon non-payment of rent for the year 1281, a suit for khas possession of the lands was brought against A and B. The defendants claimed an equitable right to prevent forfeiture by paying all arrears according to the terms of the durputni, together with all costs. *Held*, that whether or not the provisions of the Rent Law actually applied to the case, the Court was bound by the analogy of that law to apply in favour of the defendants an equity similar to the equity there given, and accordingly a decree was passed that if the defendants should pay the whole of the rent due up to date, with interest according to the conditions of the durputni, together with the costs in the High Court and Courts below, they should be relieved from the effect of the forfeiture.

APPEAL from a decision passed by the Officiating Judge of Nuddea, affirming the decree of the Subordinate Judge of that district.

Woodroffe, Baboo *Biprodass Mookerjee*, and Baboo *Nolit Chunder Bose*, for the Appellant.

J. D. Bell, (Officiating Advocate-General), Baboo *Kally Mohun Dass*, and Baboo *Radhica Churn Mitter*, for the Respondents.

The facts are sufficiently set forth in the following judgment of the High Court (1), which was delivered by

PONTIFEX, *J.* :— PONTIFEX, *J.*

In this case Paramanick granted a durputni lease to Brojonath

(1) PONTIFEX and MCDONELL, *J.J.*

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Bose of certain lands which, on Brojonath's death, devolved upon his three sons, Nobeen Chunder Bose, Rutikant Bose, and Bipeen Behary Bose. The durputni lease was dated 29thBysack 1229, and it contained this stipulation:—"I shall pay rent month by month, according to the kistibundee: should I fail in that, I shall pay interest on instalments overdue, at 1 per cent. per month. I shall pay the rent in full by the close (of every year): should I neglect to make the payments, you will, of your own authority, take over possession of the said durputni talook after the expiration of one month of the next succeeding year, and I shall have no complaint (suit) against it."

Upon the devolution of this lease, on Brojonath Bose's death, his eldest son Nobeen Chunder, on the 8th Falgoon 1247, executed a kabuliut to the then landlord under which he agreed to hold 8 annas of the durputni at one-half of the rent for himself, and the other 8 annas for his minor brothers. He agreed that the provisions of Regulation VIII of 1819 should apply, and that "all the conditions of the former kabuliut will be binding as well as those of the pottah granted to their father," and subsequently the mother and guardian of the two other sons of Brojonath, on the 10th Assin 1254, executed a kabuliut in which she claimed that her two infant sons were entitled to two-thirds of the property, and she agreed to hold those two-thirds of the property on payment of two-third of the rent. She also agreed that "all the conditions in the kabuliut delivered by my said husband will be binding upon me, and I will act up to them." Since that time the rents of this durputni have been paid in thirds, one-third being paid by Nobeen Chunder and his representatives, and the remaining two-thirds by the other sons of Brojonath. The zemindar has acquired in that arrangement, and in his books the rents are so credited. It would appear that Nobeen Chunder made a seputni of his one-third share to the principal defendant's father in this case, and the principal defendant or his father subsequently acquired the right of Nobeen Chunder to the one-third of the durputni, thus acquiescing in the division which had been recognized by the zemindar. The Paramanicks subsequently sold to the present plaintiff, and the present plaintiff shortly after his purchase sued Nobeen Chunder as the registered holder

of one-third of the durputni for the rent of the year 1281, and obtained a decree against him. He did not join the principal defendant in this case, because he was not registered in his books, but on the 21st January 1876, he instituted the present suit against the principal defendants, on the covenant in the durputni, seeking khas possession of their one-third share of the durputni in consequence of non-payment of rent. The suit was heard by the Subordinate Judge on the 22nd February 1877, and he dismissed the plaintiff's claim, holding that he could not sue in respect of one-third only of the durputni.

The plaintiff appealed from that decision to Mr. LAWFORD, the Judge of Nuddea, and he, although of opinion that the plaintiff might have sued for one-third, held that the clause of the lease under which the plaintiff sued was repugnant to the other clauses in it; that it was not intended to have the operation claimed for it, and the plaintiff, therefore, was not entitled to rely upon it.

From that decision the plaintiff appealed to this Court, and on special appeal the following order was made:—

"We agree that the clause relied on is not a clause involving continual power of resumption. The appeal is dismissed with costs."

Moreover, in that appeal, the original kabuliut was not before the Court, and it was doubtful whether the provision in the original kabuliut, which was relied upon, had been inserted in the subsequent kabuliuts.

Against that decision in special appeal the plaintiff asked for a review, and the case coming before the learned Judges who had heard the appeal, the review was granted, and in granting that review the learned Judges said:—"The plaintiff seeks further to avail himself of the stipulation in the lease, and perhaps to enforce forfeiture of the durputni."

It seems to me clear, therefore, that when that review was granted, it was intended that all points should be open for argument between the parties.

The case has now been heard on appeal as if on its original hearing, and the defendants have insisted upon their equity to prevent forfeiture of the lease, provided they pay the whole of

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the arrears of rent, according to the lease, and the costs which have been incurred in these proceedings, and we think that they are entitled to rely upon such equity. It has been pointed out to us that in recent cases in this Court, one to be found in 22 W. R., p 376, following, a prior case in 19 W. R., 349, it has been held that the provisions of the Rent Law in section 52 do not apply to leases of this nature. But on the other hand a case in 12 B. L. R., P. C., 439, *Duli Chand* vs. *Meher Chand Sahu*, before the Privy Council, has been relied on by the defendants to show that section 52 of the Rent Law may be applicable to the case of this nature where the tenure is perpetual. We do not think it necessary to decide in this case whether or not the provisions of the Rent Laws actually apply; because we think that even if they do not in terms apply, we are bound by analogy to that law to apply in favour of the defendants,—an equity similar to the equity there given. We, therefore, think that if the defendants pay the whole of the rent due up to the present time, with interest according to the stipulations of the original kabuliut and pottah, and also pay all the costs of the proceeding in both this Court and of the Courts below, the plaintiff ought not to have khas possession decreed to him. We think that the plaintiff was entitled originally in the Court below to a decree for khas possession, if the defendants failed to pay within the reasonable time after the decree (and by analogy to the Rent Law, we are inclined to think 15 days is a reasonable time) the whole amount of rent, interest and costs. We are, therefore, prepared to pass a decree now in these terms, that the plaintiff be put in khas possession of one-third of this durputni tenure, unless within 15 days from the date the amount is settled as due for rent, interest, and costs, the defendants pay to the plaintiff that aggregate amount, the interest being calculated at the rate of 1 per cent. per month according to the kabuliut. The plaintiff will make up an account of the rent, interest, and costs, which he claims to be due to him, and deliver the same to the other side who will have five days to make any objection, and if no objection is made, that sum shall be entered in the decree as payable by the defendants.

[CIVIL APPELLATE JURISDICTION.]

ANUNDO LALL DOSS . . . . . PLAINTIFF;

AND

BOYCAUNTRAM ROY . . . . . DEFENDANT.

1879 *July 11th.*

No. 7 of 1879.

Damages, Measure of—Assessment of Damages, Mode of—Practice—Fresh Issues—Civil Procedure Code (Act X of 1877), section 566.

In a suit for negligence, where it is possible for the Court to take one or more different views as to the proper measure of damages, the plaintiff must come prepared with evidence as to the amount of damages, according to whichever view the Court may adopt; and if the evidence produced is applicable to one view only, the Court is not bound to give the plaintiff a re-trial, and to allow him to remodel his case with fresh evidence under section 566 of the Civil Procedure Code.

APPEAL from a decision of Mr. Justice PONTIFEX.

The plaintiff brought this suit for damages done to his house through the defendant's negligence in not properly laying the foundations of the adjoining house. Both the Lower and the Appellate Court found that the defendants had been guilty of negligence, and that through that negligence a part of the west wall of the plaintiff's house, with a verandah and certain godowns attached on the inside, had fallen.

The plaintiff contended that the defendant was answerable not only for this damage, but also for the expense of re-building about three parts of his (the plaintiff's) house, which had become ruinous and unsafe from other causes.

According to the evidence of the plaintiff's surveyor, who was the only witness called as to the amount of damages, the sum to which the plaintiff would have been entitled upon the above theory was Rs. 25,000. But the lower Court rejected this theory; and as the cost of re-building the west wall was estimated by one of the witnesses for the defendants at Rs. 500 or Rs. 600, the lower Court awarded the plaintiff Rs. 1,200 damages only.

Against that decision the plaintiff now appealed, on the ground, *inter alia*, that the damages were under-estimated.

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which had been sold would have been liable in their hands to be seized and sold for it.

The case of *Ram Sahai* vs. *Sheo Prosad Singh*, 4 C. L. R., 226, decided by the Judicial Committee of the Privy Council on the 1st of February of the present year, only differs from this because it was established that the debt was one for which the sons were not liable, and the purchaser had taken with notice of their repudiation of it.

In the present instance the rights and interests of the fourth defendant only were sold, and there is nothing on the face of the decree to show that the other brothers were equally liable with him for the debt, or that the proceedings were taken against him in a representative capacity. Therefore, on the authority of the cases first referred to above, we must hold that the property of defendant No. 4 only passed by the sale, and that the Moonsiff was right in holding that, under these circumstances, it was not open to the defendant, who was the purchaser at that sale, to go into evidence to show that the debt was one for which a decree might have been obtained against the other brothers. Possibly it might have been so obtained, but if the judgment-creditor was content to take a decree against one brother in such a form that it did not bind the estate, the purchaser at the sale under that decree has no right to ask for more than what was attached and sold.

We, therefore, reverse the remand order made by the lower Appellate Court, and restore and affirm the judgment of the first Court with costs.

[CIVIL APPELLATE JURISDICTION.]

MOTHOORAMOHUN PAL CHOWDRY
(PLAINTIFF) . . . . . APPELLANT;

AND

RAM LALL BOSE AND ANOTHER (DEFENDANTS) RESPONDENTS.

1879
June 26th.

No. 671 of 1878.

Forfeiture—Ejectment, Right of—Act VIII (B.C.) of 1869—Equitable Relief against Forfeiture.

A seputni was granted to B by A, who held a durputni containing the following conditions, viz., "I shall pay rent month by month: should I fail in that I shall pay interest on instalments overdue at 1 per cent per month: I shall pay the rent in full by the close of every year: should I neglect to make the payments, you will, of your own authority, take over possession of the said durputni talook after the expiration of one month of the next succeeding year, and I shall have no complaint against your doing so."

Upon non-payment of rent for the year 1281, a suit for khas possession of the lands was brought against A and B. The defendants claimed an equitable right to prevent forfeiture by paying all arrears according to the terms of the durputni, together with all costs. *Held*, that whether or not the provisions of the Rent Law actually applied to the case, the Court was bound by the analogy of that law to apply in favour of the defendants an equity similar to the equity there given, and accordingly a decree was passed that if the defendants should pay the whole of the rent due up to date, with interest according to the conditions of the durputni, together with the costs in the High Court and Courts below, they should be relieved from the effect of the forfeiture.

APPEAL from a decision passed by the Officiating Judge of Nuddea, affirming the decree of the Subordinate Judge of that district.

Woodroffe, Baboo *Biprodass Mookerjee*, and Baboo *Nolit Chunder Bose*, for the Appellant.

J. D. Bell, (Officiating Advocate-General), Baboo *Kally Mohun Doss*, and Baboo *Radhica Churn Mitter*, for the Respondents.

The facts are sufficiently set forth in the following judgment of the High Court (1), which was delivered by

PONTIFEX, *J.* :— PONTIFEX, *J.*

In this case Paramanick granted a durputni lease to Brojonath

(1) PONTIFEX and MCDONELL, *J.J.*

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to Rs. 600, and we have no means whatever of estimating the expense of rebuilding the godowns, &c., which were attached to the inside of that wall.

Altogether, I consider that the plaintiff's case has been presented to the Court in an exaggerated, not to say a dishonest, form. I do not see sufficient reason for increasing the amount of damages, and if I did, I find no evidence on the record which would afford me any safe means for doing so.

Mr. Jackson under these circumstances has contended very strongly on behalf of his client, that as there is no evidence upon the record, which would enable the Court to assess the proper amount of damages according to the view which we take of the case, it is our duty to frame an issue or issues, &c., and either to send the case back to the lower Court under section 566 of the new Code to take additional evidence there, or else to take fresh evidence ourselves in this Court for the purpose of determining the plaintiff's rights.

But in my opinion the provisions of that section are not intended to apply to a case of this nature, and if they were, I certainly, in the exercise of my discretion, should refuse to act under it in this instance. That section is intended to provide for cases where some point has come to light in the Appellate Court, which has not been raised, or the importance of which has not occurred to the parties or to the Judge in the Court below.

But in this case no new point has arisen, and nothing new has transpired, which the plaintiff was not perfectly aware of at the time when he brought his suit. There is no necessity here for any fresh issue. The only issue necessary to the ends of justice is that which has been already raised and tried in both Courts—namely, to what damages under the circumstances is the plaintiff entitled?

The mistake, if any, has arisen from the plaintiff's own omission to bring forward proper evidence at the proper time in support of his own case; or rather from his determined persistence in endeavouring to enforce a claim, which, in our opinion, is unjust and untenable.

If we were to allow him under such circumstances to remodel his case, and to try it over again with fresh evidence upon a more

reasonable principle, we should be introducing a very mischievous practice. We should be encouraging dishonest plaintiffs to try experiments with the Court, by setting up and insisting upon extravagant claims, in the well-assured hope that if they failed in establishing those claims, they would be allowed to amend the proceedings and try their case over again, upon a fairer and more moderate basis. 1879

I think that both appeals should be dismissed with costs.

WHITE, *J.*:—

I concur.

[CIVIL APPELLATE JURISDICTION.]

MOONSHEE GOLAM ARUB . . . . . APPELLANT;

AND

CURREEM BUX SHAIKJEE . . . . . RESPONDENT.

July 11th.

No. of 1879.

Suit on Small Cause Court Decree—Small Cause Court, Suit on Decree of.

A suit will not lie in the High Court on a decree of the Small Cause Court—*Khoblall Baboo* vs. *Ram Chunder Bose*, I. L. R., 2 Cal., 434, over-ruled.

Berkeley vs. *Elderkin*, 1 E. and B., 805; *Austin* vs. *Mills*, 9 Exch., 288, followed.

THIS was an appeal from the decision of Mr. Justice PONTIFEX.

It appears that on the 26th of April 1877, the plaintiff obtained a decree from the Second Judge of the Small Cause Court, against the defendant, for a sum of Rs. 205-5, and for the non-payment of this sum the defendant was arrested, and committed to the Presidency Jail for six weeks. The plaintiff incurred a liability for a further sum of Rs. 9-4 for costs of execution. This amount, added to the abovementioned Rs. 205-5, made a total of Rs. 214-9, for which sum the plaintiff sued the defendant in the High Court. In his plaint, he stated that the defendant had no moveable property whatever, within the jurisdiction of the Small Cause Court, upon which he could execute the decree of that Court, but that he was possessed of a dwelling house at No. 28, Moonsheetollah.

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Mr. Justice PONTIFEX, before whom the case was tried, dismissed the plaintiff's suit on the ground that the defendant had already been imprisoned under the Small Cause Court judgment, and that such imprisonment operated as a satisfaction of the debt.

The plaintiff appealed from this decision.

Trevelyan and *Andrews*, for the Appellant.

No one appeared for the Respondent.

The following judgments were delivered by the Court (1):—

GARTH, *C.J.* GARTH, *C.J.*:—

This suit was brought to recover Rs. 214-9 upon a judgment of the Calcutta Court of Small Causes.

The learned Judge in the Court below has dismissed the suit, upon the ground that the defendant had already been imprisoned under the Small Cause Court judgment, and that it would be contrary to the spirit and the intention of the Small Cause Court Act, to allow this suit to proceed, and so to subject the defendant to be taken in execution again for the same debt under process of this Court.

It seems that since the year 1850, when the Small Cause Court Act, IX of 1850, was passed, a number of suits of this nature have been brought from time to time in the High Court, and judgments have been obtained in them without objection. None of them were defended; and the question seems never to have been seriously raised, until about a year ago, whether such suits would lie, so that we have now to decide that question in an Appellate Bench of this Court for the first time.

The particular point upon which Mr. Justice PONTIFEX dismissed the suit, appears to us to be only one of several considerations which ought to be enquired into for the purpose of ascertaining, whether it was the intention of the Legislature that judgments in the Small Cause Courts should be enforced by suits in this Court. We must see how far such suits are consistent with the provisions of Act IX of 1850, and, on the other

(1) GARTH, *C.J.*, and WHITE, *J.*

hand, how far such suits are calculated to defeat the intentions of that Act.

The same question arose in England, after the passing of the first County Court Act there.

That Act was the 9 and 10 Vic., Cap. 95, and its provisions were in many respects very similar to those of the Indian Act of 1850, which was passed a few years later.

The case in which the subject was first discussed was *Berkeley* vs. *Elderkin* (1 Ellis and Blackburn, 805). The point was there raised for the first time in the Court of Queen's Bench, whether an action would lie in a superior Court upon a judgment of the County Court; and Lord CAMPBELL, in his judgment, says: "*Primâ facie* an action lies on the judgment of every Court of competent jurisdiction; but I think it quite clear, when we look at the provisions of the 9 and 10 Vic., Cap. 95, that the intention of the Legislature was to confine the remedy on the judgments of Courts constituted under that Act to the remedies specially provided by the Act.

"The policy of the Act was to give a cheap and easy remedy for the recovery of small debts. The intention of the Legislature will be entirely defeated if the creditor is at liberty to adopt this course.

"The Act provides special remedies for enforcing the judgment."

His Lordship then goes on to point out particular provisions in the County Court Act, which were inconsistent with suits being brought upon County Court judgments, and which would tend to defeat the objects of the Act itself.

Thus, by section 96, the wearing apparel and bedding of the execution-debtor and the tools and implements of his trade, to the value of £5, were to be protected from execution.

"That protection," says his Lordship, "would be entirely lost, if this action were maintainable; for on a judgment of the superior Court, a *fi-fa* might issue, under which the debtor's tools in trade might be taken and sold by the Sheriff."

So again, as to the debtor's person. He could be imprisoned under the Act for only 40 days; and then not by way of execution, but as a punishment for contempt of Court. But if an

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action in the superior Court lay upon the judgment, the debtor would be subject to the ordinary process of execution in the latter Court, over and above what he might have undergone in the County Court.

Then, again, by section 100 of the County Court Act, the Judge of the County Court had a right to rescind, or alter any order that he may have made against any defendant, for the payment, by instalments or otherwise, of any debt or damages recovered, and to make any other order, either for the payment of the whole of such debt or damages, or by instalments, or otherwise, as to the Judge might seem just. "This shews," says Lord CAMPBELL," that there is nothing in the nature of a final judgment in the County Court. The Judge has still jurisdiction over this very judgment on which this action is brought. He might now rescind or alter it, and make a new order to pay by instalments, or at some other time. That power given to the Judge would be defeated, if this action lay."

This last point was also especially relied upon by Mr. Justice WIGHTMAN, and the Court unanimously decided that the action would not lie.

This case was followed by the Court of Exchequer, in the case of *Austin* vs. *Mills* (9 Exch., 288), and it has since been the undoubted law of Westminster Hall.

The only reported case in which, so far as we can find, the question has been at all discussed here, is that of *Khoblall Baboo* vs. *Ram Chunder Bose* (I. L. R., 2 Cal., 434).

Some doubt having been expressed at that time by one of the Judges of this Court, as to whether a suit of this kind was maintainable, Mr. Justice KENNEDY proposed to refer the question to a Full Bench; but as his Lordship's own opinion was in favor of the practice, which had prevailed, of allowing such suits, it was considered that the case was not one for a Full Bench, and after hearing an *ex-parte* argument from Mr. Bonnerjee, Mr. Justice KENNEDY decided in accordance with the existing practice.

The ground of the learned Judge's decision appears to have been, that the particular provisions in the County Court Act in England, which influenced the Courts there in deciding that

such suits would not lie, were not to be found in Act IX of 1850, but it is much to be regretted that the case was not argued on the part of the defendant, because his Lordship's attention does not appear to have been called to certain provisions of Act IX of 1850, which seems to us to render the arguments and reasons used by the Court in *Berkeley* vs. *Elderkin*, directly applicable to suits like the present.

Thus by sections 58, 60, 61, and 68 of the Act IX of 1850, a debtor may be taken in execution for non-payment of a sum, which he has been ordered to pay, but his imprisonment is not to operate as a satisfaction of the debt, and is not to continue for more than six calendar months; and when the debtor has once been taken in execution, he cannot be imprisoned again upon the same judgment.

But, if the judgment-creditor can bring a suit upon the judgment in the High Court, he would, of course, have the usual remedies for enforcing the judgment which he obtains there, and one of those remedies would be, that he might imprison the execution-debtor again, notwithstanding the provisions of section 61 of the Act of 1859.

This would obviously be in direct contravention of the intention of the latter Act, and this is the point upon which the judgment of Mr. PONTIFEX proceeded in the Court below.

Again, by section 69 of the same Act, certain goods of the judgment-debtor are exempted from execution precisely as they are by the County Court Act in England, namely, the wearing apparel and bedding of himself and his family, and the tools and implements of his trade.

But if the judgment-creditor can sue in this Court on the Small Cause Court judgment, he may, under the process of this Court, execute his decree against all the property of the judgment-debtor, including that which is protected by the Act of 1850.

Then, again, under section 71 of the Act of 1850, the Small Cause Court has power, in case of the sickness of the debtor, or his inability to pay, to suspend or stay any judgment or order, which may have been pronounced against him "in any action at such time and on such terms as it shall think fit, and so from

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time to time to suspend or stay such judgment or order until the defendant's disability shall have ceased."

This is a very similar provision to that of the English County Court Act, and the effect of it, as pointed out by the Court of Queen's Bench, is to make the judgment of the Small Cause Court not final. The Judge has power to suspend or stay a judgment, or give the defendant further time to pay it.

It is clear that this provision would be entirely defeated if the judgment-creditor could bring a suit upon his judgment and enforce it at once in this Court. It would be absurd to allow a judgment-debtor to be sued upon a judgment in the High Court, while the Small Cause Court Judge might be staying the judgment in the Court below, or giving the debtor further time to pay it.

These provisions, which we have pointed out in the Act of 1850, seem precisely analogous to those of the County Court Act, which induced the Courts in England to decide that a suit does not lie upon a County Court judgment, and we think that the arguments of the Judges in the case of *Berkeley* vs. *Elderkin* are directly applicable to the present case.

The Act of 1850 provided here rights for creditors with special and appropriate remedies, and if the ordinary remedies in the High Court were superadded to these, not only would the objects of the Act be defeated, but it might become, in the hands of creditors, an instrument of injustice and oppression.

We may observe that this point was decided many years ago in the Supreme Court of Bombay in accordance with the view which we now take of it, and that the decision has since been considered as the law of the Bombay High Court.

WHITE, *J.* WHITE, *J.* :—

I quite concur in the judgment of the Chief Justice. The case referred to by my Lord was determined in the late Supreme Court of Bombay, about 20 years ago. It was determined on the authority of *Berkeley* vs. *Elderkin* and *Austin* vs. *Mills;* the learned Judges who decided the case holding that the reasons for the decisions of the Court of the Queen's Bench, and the Court of Exchequer, applied to a judgment of the Small Cause C

of the Presidency Towns of India, equally as well as to a judgment of the County Court in England. 1879

The case is not reported, because at that time there were no reports of the Supreme Court at Bombay in existence, but I was Counsel in the case which arose upon a demurrer, filed to an action on a judgment of the Small Cause Court at Bombay; I argued the demurrer, and the demurrer was allowed.

Since that date, as far as my experience goes, it has always been considered to be the law in Bombay that no action will lie on the judgment of a Small Cause Court.

GARTH, *C.J.* :—

The appeal is dismissed with costs.

[CRIMINAL REVISIONAL JURISDICTION.]

CHUNDER MADHUB GHOSE . . . . . *June 27th.*

AND

JUGGUT CHUNDER SEN . . . . . No. 115 of 1879.

Criminal Procedure Code (Act X of 1872) section 530—Proceeding based upon insufficient materials—Jurisdiction.

Where the proceeding recorded by a Magistrate, under section 530 of the Criminal Procedure Code, is based on materials which do not disclose sufficient ground for considering that a breach of the peace is imminent, an order calling upon the parties concerned in the dispute to attend in Court, and give in a written statement of their respective claims, in respect of the fact of actual possession of the subject of dispute, may be set aside as made without jurisdiction.

THIS was an application under section 297 of the Criminal Procedure Code to set aside an order of the Deputy Magistrate of Baghat in the District of Jessore, instituting a proceeding under section 530 of the Criminal Procedure Code.

In 1878 the petitioner, Chunder Madhub Ghose, at a sale in execution of a decree, purchased the right and interest of Messrs. Sorell and Lightfoot in a Mehal called Betiboonia, situated in the sub-division of Baghat. The sale was duly confirmed, and the purchaser put in possession, on the 23rd August 1878. A

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Statement.

cutcherry was erected, and endeavours were made to realize the rents from the ryots.

On the 29th January 1879, one Babooram Samadar presented a petition to the Deputy Magistrate, alleging that his masters had, in 1281, obtained an *ousat* talookdaree pottah of the mehal from Messrs. Morell and Lightfoot, and were in possession and in receipt of rent from the tenants. The petition further suggested that the servants of Chunder Madhub Ghose had ill-treated the ryots, and that, in the event of their being opposed, there was a probability of a breach of the peace occurring.

The police were, thereupon, directed to make an enquiry, and on the 3rd February they reported that, although no breach of the peace had taken place, it was possible such a breach might happen, and recommended both parties to be bound down to keep the peace.

Accordingly, on the 17th March, proceedings were instituted under section 491 of the Criminal Procedure Code.

But the Deputy Magistrate, after recording certain evidence in these proceedings, on the same day, made an order calling upon both parties under section 530 to appear on the 2nd April, and produce their evidence before him in a proceeding which he thereupon instituted under that section. This proceeding set out that "it appears from the report of the police that both parties have commenced a quarrel with regard to kismut Betiboonia, and that there is a likelihood of a breach of the peace in the future."

The first proceedings, instituted under section 491, resulted, on the 22nd March, in five of the servants of the present petitioner being bound down to keep the peace, but on appeal, the Magistrate of Jessore set the order of the Deputy Magistrate aside, on the ground that the evidence did not prove the likelihood of a breach of the peace.

An application was then made on behalf of Chunder Madhub Ghose to have the proceedings under section 530 transferred to another Magistrate; but this was refused by the Magistrate. Whereupon the petitioner applied to the High Court to have the order directing the proceedings under section 530 set aside on the ground that the materials on which it was based did not disclose that either party had done anything, or was about to

do anything likely to cause a breach of the peace. A rule to show cause was granted, and now came on for hearing.

Baboo *Kashi Kant Sen*, shewed cause.

M. Ghose, Baboo *Umbica Churn Bose*, and Baboo *Doorga Mohun Dass*, contra.

Baboo *Kashi Kant Sen*.—Under the new Code of Criminal Procedure, a Magistrate may record a proceeding on a Police Report or any other information, and is not bound to take evidence, although in a recognizance case he cannot bind any one without recording evidence. The two cases are therefore quite distinct. It does not follow, therefore, that because the Magistrate of the district has held that the evidence recorded by the Deputy Magistrate was insufficient to support the order for recognizance, that evidence is insufficient to satisfy the Deputy Magistrate for the purpose prescribed in section 530.

[WHITE, *J.*—You mean that an order for recognizance cannot be made except upon evidence, but under the explanation to section 530, a Magistrate may act upon any private report and need not act upon any evidence; and that if the Magistrate says he is satisfied that a breach of the peace is likely, we cannot go behind it.]

Yes; it has been held that a Magistrate, in a case under section 530, is not bound to take evidence—*In the matter of J. D. Sutherland*, 9 B. L. R., 229. In this case the Deputy Magistrate has recorded a proceeding, and that is a sufficient compliance with the requirements of the section. Even if this Court has the power of going behind the proceeding, I submit that the Police Report and the statements of the parties are sufficient to show that there might be a breach of the peace at any moment.

Ghose (in support of the rule)—A Magistrate has no jurisdiction to interfere in cases of this kind, unless he has *acquired* it by recording a proceeding upon sufficient materials, stating that he is satisfied that a breach of the peace is imminent.

[WHITE, *J.*—He has recorded a proceeding and he says he is satisfied. How can we go behind that?]

He must be satisfied upon sufficient and proper grounds, and the grounds ought to appear on the face of the proceeding. Here the

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proceeding simply states that "it appears from the evidence in the recognizance case, the Police Report and the statements of the parties, that a breach of the peace is likely," and I submit that such a proceeding is bad, inasmuch as it does not contain any grounds.

[WHITE, *J.*—The Magistrate refers to the record in the recognizance case, and I think we must take that record as substantially forming a part of this proceeding.]

Even then I contend that the materials and grounds referred to are insufficient.

[WHITE, *J.*—How can we go into that?]

The object of recording a proceeding containing the Magistrate's grounds is simply to enable this Court, as a Court of Revision, to see that the Magistrate has not arbitrarily interfered in disputes which ought ordinarily to be settled by the Civil Courts—*Per* GARTH, *C.J.*, in *Sheikh Munglo* vs. *Durganarain Nag*, 25 W. R., Cr. Rul., 76. I do not go the length of saying that the materials must be based upon evidence on oath, but they must be of such a character as to lead reasonably to the belief that unless the Magistrate mean to interfere a breach of the peace will be inevitable. This was the view taken by Mr. Justice PHEAR in the matter of *Kishoree Mohun Roy*, 19 W. R., Cr. Rul., 10, and there his Lordship explains what he meant to say in an earlier decision which was dissented from by Sir RICHARD COUCH, in the case cited by the other side.

[WHITE, *J.*—Are not the admitted facts of the case, viz., that you are trying to realize rents from the ryots; that you have erected a cutcherry for that purpose; and that the other side have set up an under-tenure which you dispute, sufficient to lead to the inference that a breach of the peace is likely? Cannot the Magistrate, knowing the character and tendencies of the people say that such facts satisfy him, that a dispute likely to induce a breach of the peace exists?]

I submit not. Otherwise a Magistrate may interfere in the case of every dispute, for of all disputes regarding land, a Magistrate may say in one sense that a breach of the peace is possible. In the present case the ryots are paying us willingly, and we are holding our cutcherry in the house of a ryot with his consent. It must be shown that we have done

some act or acts which are calculated to lead to a certain breach of the peace. I contend that, although the Magistrate may be satisfied upon statements or information not on oath, those statements must be similar in character and effect as would be necessary in order to bind down a person under section 491, because the words there are also "any person likely to commit a breach of the peace."

[WHITE, *J.*—That section has reference to "a person," but section 530 refers to "a dispute."]

Yes, but the words are "all parties concerned in *such* dispute," that is, a dispute likely to lead to a breach of the peace. Therefore, what must be shown as regards "a person" in a case under section 491, must also be shown as regards "parties concerned in a dispute," in a case under section 530. Now it has been held in two cases in 22 W. R., 79, that the accused must have done or must have been contemplating some specific act before he could be bound down under section 491. Those decisions, I submit, are applicable to the present case, the only difference between the two classes of cases being, that in the one evidence must be recorded on oath, and in the other it need not be so. If, then, the materials are in the present case insufficient, the Magistrate has acted without jurisdiction, and his proceeding ought to be quashed.

The following judgments were delivered by the Court (1) :—

MORRIS, *J.*:— MORRIS, *J.*

The petitioner, Chunder Madhub Ghose, asks this Court to set aside a proceeding of the Deputy Magistrate of Baghat, dated March 17th, 1879, which he has recorded under the provisions of section 530 of the Criminal Procedure Code. In this proceeding he records the fact that a dispute exists, which is likely to induce a breach of the peace between Juggut Chunder Sen and one Chunder Madhub Ghose relative to certain land called Betiboonia, and he calls upon them to give in, within a specified time, a written statement of their respective claims as respects the fact of actual possession of the land in dispute. The peti-

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tioner seeks relief on the ground that this proceeding is uncalled for, and without jurisdiction.

The circumstances of the case are as follows:—On the 4th March 1874 a certain property of the Messrs. Morell, named Mehal Betiboonia, was sold in execution of a decree of the Civil Court, and purchased by Chunder Madhub Ghose. On the 23rd August 1878, Chunder Madhub Ghose was put in possession by the Court. On the 21st January 1879 one Babooram Samadar, a servant of Juggut Chunder Sen, presented a petition to the Deputy Magistrate of Baghat, representing that his master obtained Mehal Betiboonia as an *ousut* talook tenure under a lease granted to him by the Messrs Morell in 1871, and had been in possession and in the receipt of rent from the ryots since that date; that Chunder Madhub Ghose purchased the proprietary rights of the Messrs. Morell in this property, at an excecution sale on Phalgoon 21st, 1284, that he had sent servants and lattyals who were seizing the ryots and committing various kinds of oppression upon them, that if on the part of his master, opposition was offered for the protection of the ryots, an affray would probably take place, and he, therefore, prayed that securities and recognizances in heavy sums might be taken from certain servants of Chunder Madhub Ghose, whom he named.

Upon this the Deputy Magistrate called for a report from the Police, and on the receipt of their report he, on February 13th, 1879, issued summonses on the persons named, calling on them to show cause why they should not be bound down in various specified sums to keep the peace. On their showing cause the Deputy Magistrate, on the 17th March 1879, recorded the proceeding under section 530, which is now objected to, and on the 22nd March, he bound the persons down in heavy recognizances to keep the peace. The persons, so bound down, appealed to the District Magistrate, and he set aside the order on the ground that the evidence upon which the Deputy Magistrate had adjudicated did not prove, that these persons were likely to commit a breach of the peace. As the Deputy Magistrate did not on this stay further proceedings under section 530, and the District Magistrate had no authority to interfere with his action under that section, the petitioner applies to this Court to restrain him by

cancelling the initial proceeding of March 19th. The petitioner contends that there are no grounds for that proceeding, as the information or evidence on which it is based is precisely the same as that upon which his servants were bound down to keep the peace, and in respect to which the Magistrate has held that it does not suffice to prove that they were likely to commit a breach of the peace. We observe, however, that what may satisfy a Magistrate that a dispute likely to induce a breach of the peace exists concerning any land which justifies his taking action, under section 530, is very different from the evidence necessary to warrant an order under section 491, which bears upon the conduct of the particular person affected by it. It is necessary, therefore, to see what are the grounds stated in the proceeding of March 17th which have satisfied the Deputy Magistrate that a dispute likely to induce a breach of the peace existed concerning Mehal Betiboonia. Unfortunately, in this proceeding, the Deputy Magistrate has not recorded any specific grounds. He refers to the statements of the parties, the evidence of the witnesses and the police report, and states that they satisfy him that a dispute likely to induce a breach of the peace exists concerning this property. We have had these statements, &c., read to us, and certainly no hostile act or even hostile intention on the part of either side can be gathered from them. The District Magistrate was perfectly right in holding that upon such evidence no person could be bound down to keep the peace. What these statements, evidence, and report amount to, is this,—that each party lays claim to the direct receipt of rent from the ryots; that since his purchase Madhub Chunder Ghose has made use of one of the houses of his tenants which the tenant has given him for the purpose of a cutcherry; that he is inducing the ryots to pay their rent to him; and that while the first kist of the year has been paid to Juggut Chunder the second has been paid to Chunder Madhub Ghose.

There can be no question that at present the attitude of both sides is peaceful, and that each is acting within his own supposed right; no attempt at compulsion is exercised on the ryots in the matter of the payment of the rent, each party being content to take such rent as the tenants choose to pay him. Two

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MORRIS, *J.*

questions here arise: 1st, whether, in such a state of things as this, there are any proper grounds which would justify a Magistrate recording a proceeding, and taking action under section 530; and, 2nd, whether he is justified in recording such a proceeding unless there is an immediate prospect of a breach of the peace arising out of the dispute in question. We think that the rulings of this Court go to show that both these questions must be answered in the negative. The case of *Raja Run Bahadoor* vs. *Ranee Tihosub Koer*, reported in 22 W. R., 79, was somewhat similar to the present, though there the disputes had assumed a far graver complexion. In it the principle was affirmed that there must be some specific hostile act on the part of one of the parties going to show that a breach of the peace is probable. A Criminal Court would not interfere when the acts committed were honest acts done in assertion of a supposed claim of right, and which did not, in themselves, indicate an intention of afterwards proceeding to criminal conduct, in the shape of a breach of the peace. Again a Full Bench of this Court, in re *Sheikh Mungle* vs. *Doorga Narain Nag*, 25 W. R., 74, distinctly held that, however serious the dispute may be between the claimants, and however desirable the Magistrate may consider it to settle that dispute, he has no right to interfere unless a breach of the peace is *imminent*. Here not only is there no act on the part of either side from which any hostile intention may be drawn, but the Deputy Magistrate has expressly recorded that it is to guard against a breach of the peace "in the future" that he takes action under section 530; clearly no immediate probability of a breach of the peace is contemplated by him. In both these points of view, therefore, we are of opinion that the Deputy Magistrate's proceeding is bad, as based upon what are in fact no grounds at all, and is, therefore, made without jurisdiction. Accordingly we set it aside, and direct the Deputy Magistrate to stay further action under it.

WHITE, *J.*

WHITE, *J.*:—

I concur.

[CIVIL APPELLATE JURISDICTION.]

AUKHIL CHUNDER SEN RAY (PLAINTIFF) APPELLANT;

AND

BABOO MOHEENEE MOHUN DAS AND OTHERS . . . . . (DEFENDANTS) RESPONDENTS.

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June 27th.

No. 325 of 1878.

Special Appeal—Jurisdiction—Valuation of Suit—Appeal preferred in wrong Court.

Where an appeal is preferred to a District Court against a judgment in a suit for possession of property valued at over Rs. 5,000, the High Court will, on Special Appeal, set aside the judgment of the lower Appellate Court as made without jurisdiction, although both sides may have acquiesced in the appeal being heard in the District Court.

APPEAL from a decision passed by the Judge of Tipperah, modifying the decree of the First Subordinate Judge of that District.

The plaintiff sued for possession of an 8-anna share of a talook, bearing No. 1159 on the rent-roll of the Collectorate of Zillah Tipperah, and paying a revenue of Rs. 384 per annum. He valued the suit at 10 times his share of the Government revenue, or Rs. 1,920, and paid stamp duty accordingly. The defendants, in their written statement, objected, amongst other things, to the valuation of the suit. In para. 2 they say: "The plaintiffs have stated in their plaint that the value of the properties is Rs. 60,000, but in reality the value of them may be Rs. 15,000 or Rs. 16,000. Under such circumstances, the plaintiffs having instituted the suit, estimated at Rs. 1,920, the estimated valuation of the property is there less, and the cognizance of this case by this Court in Appeal hereafter, will be altered."

The First Court overruled this objection in the following terms:—"The claim has been valued, I find, at ten times the revenue of the share in claim. It has not, therefore, been undervalued, see rule 5, section 7, chapter 3 of Act VII of 1870." The Subordinate Judge finally gave a decree in favor of the plaintiff. Against

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this decree the defendants appealed to the Court of the District Judge, and amongst other objections took the following: "That it being ascertained that the proper value of the property in suit is Rs. 5,000, the plaintiff in instituting the suit without laying the valuation, and paying stamp duty accordingly, has altered the jurisdiction of the Appellate Court. The lower Court has wrongly overruled the objection without regard to this defect." The District Judge dealt with this objection thus:—"There are many grounds of appeal against this decision. First, that the value of the suit has been erroneous. That it should have been calculated at Rs. 50,000, which would have taken the case to the High Court in Regular Appeal. With the finding of the lower Court on this point, I am not now inclined to interfere. He has been guided by rule 5, section 7, chapter 3, of Act VII of 1870, which seems applicable." The Judge proceeded to deal with the rest of the appeal, and gave a decree modifying that of the First Court. Dissatisfied with this, the plaintiff now preferred this special appeal to this Court. The first ground taken by the appellant is in these words:—"For that as the value of the property in dispute was upon the allegation of both parties above Rs. 5,000, the District Judge had no jurisdiction to hear the defendant's appeal, or to set aside the findings arrived at by the First Court. That the decision of the Judge should be set aside, and that of the Subordinate Judge should be restored."

Woodroffe, and Baboo *Sreenath Dass*, Baboo *Kali Mohun Das*, and Baboo *Hurry Mohun Chuckerbutty*, for Appellant.

Branson, and Baboo *Chunder Modhub Ghose*, Baboo *Mohini Mohun Roy*, and Baboo *Lal Mohun Dass*, for Respondents.

Woodroffe.—The lower Appellate Court had no jurisdiction to hear the appeal preferred to it by the defendants, and the order of the District Judge ought to be set aside.

The mode of computing the value of the subject-matter of a suit, provided by Act VII of 1870, was intended for the purpose of determining the amount of Court fees only, and has no reference to the question of the jurisdiction of the Court—*Jubraj Sing* vs. *Inderjeet Mahton*, 18 W. R., 109; *Nauhoon Sing* vs. *Toofanee Sing*, 20 W. R., 33; *Chunder Nath Bhuttacharjee* vs.

Brindabun Shaha, 25 W. R., 39; *Ahollya Bai Debia* vs. *Shama Churn Bose*, 1 C. L. R., 473.

The appellants are not now precluded from showing that the value of the property in dispute was such, that the appeal should have been preferred to this Court in the First Instance, by way of Regular Appeal—*Baboo Lekraj Roy* vs. *Kanhya Singh*, L. R., 1 I. A., 317; see *Khajah Ashanulla* vs. *Karoona Moyee Chowdhry*, 4 C. L. R., 125.

In *Debukee Nundun Sen* vs. *Mudhoo Muttee Goopta*, 24 W. R., 478, it was held under Act XXIII of 1861, that where a suit is improperly brought in a Civil Court, which has no jurisdiction to entertain it, the parties are not barred from coming, upon Special Appeal, to have the matter put right—see *Kisto Chunder Mozumdar* vs. *Dwarkanath Biswas*, 10 W. R., 32, and *Nauhoo Singh* vs. *Tofan Singh*, 14 W. R., 228.

Baboo *Chunder Madhub Ghose* contended that the plaintiffs must be taken to have consented to the appeal being heard by the lower Appellate Court, and should not now in Special Appeal be allowed to raise the question of jurisdiction—*Mahomed Hossein* vs. *Rajah Akhoya Narain Paul*, 18 W. R., 37; *Brohmo Moyee Dassia* vs. *Anund Chunder Chatterjee*, 22 W. R., 120.

Branson (on same side).—The principle laid down in *ex-parte Manohar Bhivrav Potanis*, 2 Bom. H. C. R., 396, that where a defendant in a suit does not raise the plea of want of jurisdiction, he must be taken to submit to the jurisdiction, ought to apply here, although, no doubt, the objection in that case was taken in execution proceedings. A somewhat similar point was raised in *Drobo Moyee Dabee* vs. *Bipin Mundul*, 10 W. R., 6, in an application for the Court to exercise its extraordinary powers by reason of the case having been taken before a Collector instead of a Judge. There MARKBY, *J.*, said: "The applicant took his chance of a decision in his favour in the Court of the Collector without in any way protesting against the jurisdiction. And although his conduct in this respect will not give that Court jurisdiction, still it is in our opinion sufficient to prevent him coming before this Court, and asking it to exercise its extraordinary powers of relief in his favour."

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Argument.

The error into which we have fallen had its inception in the fault of the defendant, and if the Court allows the objection to be taken now, it ought only to do so on the plaintiff being put on terms.

The appeal in the lower Court was within the statutory period of 30 days, and upon the proper stamp. That being so, I would ask, lest we should now be deprived entirely of our right of appeal to this Court, that the appeal preferred in the lower Court should be transferred to this Court and heard here in Regular Appeal.

Woodroffe (in reply.)—The plaintiff did everything he was bound to do. He paid the stamp duty which both the Courts below held to be sufficient.

It is clear from section 12 of the Court Fees Act, (VII of 1870) that there was no appeal to the District Court. The defendants were aware of the actual value of the property.

The consent of parties will not give a Court jurisdiction. The observations in the judgment in the case of *Mahomed Hossein* vs. *Rajah Akhoya Narain Paul*, 18 W. R., 37, cited by the other side, show that an appeal did lie. *Ex-parte Manohar Bhivrav Potanis*, 2 Bom. H. C. R., 396, proves nothing; for the objection in that case was taken in execution proceedings, and a Court executing a decree has no power to go into the merits of the decree. In *Drobo Moyee Dabee* vs. *Bepin Mundul*, 10 W. R., 6, it is stated that the conduct of the applicant did not give jurisdiction to the Courts below.

In *Gooroo Persad Roy* vs. *Juggobundoo Mozoomdar*, W. R., F. B. No. p. 15, it was distinctly laid down by a Full Bench, that the Court may receive and adjudicate a point of jurisdiction, though not taken in the Court below, because acts done without jurisdiction are acts of no legal effect at all, and must be set aside. See also *Bidhobudden Mookerjee* vs. *Doorga Monee Debia*, 2 W. R., 157; *Nobeen Kishen Mookerjee* vs. *Shib Pershad Pattack*, 7 W. R., 490; *Naunhoo Singh* vs. *Tofan Singh*, 14 W. R., 228; *Roy Bhoopendro Nath Chowdhry* vs. *Kalee Prosunno Ghose*, 24 W. R., 205; *Debukee Nundun Sen* vs. *Muddoo Muttee Goopta*, *ib.* 478; and *Koylash Nath Chund* vs. *Monmoheeny Dassee*, Marsh., 276.

If the defendant wishes the appeal to the District Court to be treated as a Regular Appeal to this Court, we should have had notice of their application to have it so treated.

The following judgments were delivered by the Court (1):

MORRIS, *J.* :—

Judgment.

MORRIS, *J.*

The plaintiff, appellant, contends that for the purpose of the stamp duty he rightly valued the suit in the first instance; that he made no concealment of the real value of the property, estimating it in his plaint at Rs. 60,000; that defendants at their own risk took their appeal into the wrong Court, and even there raised the issue of valuation and jurisdiction as they had done in the first Court, but were overruled, and so the appeal had to be heard; and that, consequently he, the plaintiff, is not debarred from taking this objection now. The defendants reply that the plaintiff consented to the hearing of the appeal in the Court below, and went so far as to ask the Judge to make one Koylash Chunder Chowdhry a co-respondent with him in the appeal, and that, therefore, he must be held to have submitted to the jurisdiction of the Court of the District Judge, and cannot be allowed to raise the point at this late stage of the case. Various authorities have been cited in support of the proposition that the jurisdiction having been consented to in the lower Appellate Court, objection to the jurisdiction cannot be taken in the High Court in Special Appeal.

What has happened here is, that neither the parties nor the Courts below were apparently aware that the valuation of the suit for the purposes of stamp duty, and the valuation of the subject matter of the suit for the purpose of determining the jurisdiction of the Court in appeal, are two different things. Throughout the proceedings up to the presentation of this appeal they have treated the two as inseparable, and thus it comes about that the defendants now desire to take advantage of the ignorance or inability of the plaintiff to urge this plea properly in the Court below, and so shut him out from the benefit which he might otherwise derive from this distinction. I am disposed to think that the

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Judgment.

MORRIS, *J.*

preponderance of authority favors the view that where a Court has no jurisdiction to entertain, as here, an appeal, no consent of parties can give it a jurisdiction which it does not by law possess. But independently of this, I am unable to hold that the conduct of plaintiff, who was respondent in the Court below, amounts to a consent to its jurisdiction. The point of jurisdiction was directly raised in the grounds of appeal of the defendant, and the Court having overruled it—whether from not rightly grasping its full significance is immaterial—nothing really remained to the respondent but to resist the appeal to the best of his ability. I consider, therefore, that plaintiff's conduct in this respect cannot be construed as such a consent to the jurisdiction as debars him from taking this objection now in Special Appeal. This being so, it seems clear that as both parties admit the value of the property in suit to be more than Rs. 5,000, the District Judge had no jurisdiction to hear the appeal of the defendants. His order, therefore, as being *ultra vires*, must be set aside, and the decree of the First Court restored. Plaintiff will get his costs in this Court and in the Court below.

PRINSEP, *J.*

PRINSEP, *J.*:—

There is no doubt that until the presentation of this Special Appeal the parties to this suit, as well as the lower Appellate Court, misapprehended the law regarding jurisdiction to try a suit or appeal, as determined by the value of the subject matter involved. That, as has been pointed out by this Court in more than one case is quite irrespective of the value for purposes of assessing the Court fee payable on the plaint or petition of appeal which, for the sake of convenience, is fixed by certain rules, which determine an artificial value for purposes of the stamp revenue. The value of the subject matter of a suit or appeal on which depends the jurisdiction of the several grades of Civil Courts, is the actual value of the property in litigation. The objection taken, both in his written statement, and first ground of appeal to the lower Appellate Court by the defendant, was directed to the valuation of the suit for purposes of stamp revenue, and this it was contended would affect the jurisdiction of the lower Appellate Court. It cannot, in my opinion, be right

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PRINSEP, J.

ly said that the defendant objected to the jurisdiction of the lower Appellate Court, for he submitted to that jurisdiction by filing his appeal there, and if he had correctly understood the law, he would have presented his appeal to this Court as a Regular Appeal for there can be no question on admitted facts, that the value of the property in suit is much beyond Rs. 5,000, or the jurisdiction of the Court of the District Judge as a Court of Appeal. It is only when it is necessary to find any fact regarding the value of the subject matter of a suit that this Court in Special Appeal is precluded from entertaining the objection of want of jurisdiction of the Court of the District Judge as a Court of Appeal. The fact that the respondent may not have objected in the lower Appellate Court is immaterial, since no consent of parties can give a Court jurisdiction when jurisdiction on the face of the pleadings does not exist.

On these grounds I concur in setting aside the judgment of the lower Appellate Court.

[CIVIL APPELLATE JURISDICTION.]

1879 *July 10th.*

No. 187 of 1878.

RUN BAHADUR SINGH . . . . . APPELLANT;

AND

MOHARANEE RAJRUP KOER . . . . . RESPONDENT.

Act X of 1865, *sections* 244 *and* 256—*Probate—Jurisdiction of District Judge—Executor, Security not required from.*

In an application for probate of a will it is sufficient for the purpose of giving jurisdiction under section 244 of Act X of 1865 that the property alleged by the petition to have been situate within the jurisdiction of the Judge should have been in the possession of the testator at the time of his death.

It having been the uniform practice of the Court to grant probate without taking a bond from executors named in the will, *held* that it was unnecessary to depart from the practice, notwithstanding the words of sections 3 and 256 of Act X of 1865.

APPEAL from an order passed by the District Judge of Gya.

In this case an application was made on the 4th February 1878, by Moharanee Rajrup Koer, as executrix and legatee, for probate of the will of Moharanee Inderjit Koer, deceased, the widow and heiress of Moharaja Ram Kishen Singh, the adopted son of Moharaja Het Narain Singh.

The alleged will was executed at Brindabun, where the testatrix died on the 9th of January 1878. The petition, upon which the application was made, stated that the permanent residence of the deceased was at Ticcari, in Zillah Gya, and that most of her moveable and immoveable property were situated in that zillah. It was objected by Baboo Run Bahadoor Singh, who claimed the property which the will purported to dispose of, as next-of-kin of Moharaja Het Narain Singh, that inasmuch as no part of this property was the stridhun of the testatrix, she had no disposing power in regard to it. It was admitted, however, that up to the time of her death this property had been in the possession of the testatrix.

The District Judge of Gya was of opinion that it was unnecessary, under the provisions of section 244 of Act X of 1865, to

require proof of the ownership of property disposed of by the will, and he accordingly admitted the will to probate. Evidence having been taken on both sides, and the will found to have been duly executed by the testatrix, the Court directed that probate of the will should be granted to the petitioner.

From this order Baboo Run Bahadoor Singh appealed to the High Court.

Among other grounds, it was alleged that the Judge had no jurisdiction to admit the will to probate, inasmuch as it had not been shown that the testatrix was possessed of any property within the jurisdiction of the Court, of which she was competent to dispose; that the will was not duly executed, and that under any circumstances, having regard to the provisions of sections 3 and 256 of Act X of 1865, the grant of probate should have been made conditional upon the applicant furnishing good and sufficient security.

Baboo *Mohesh Chunder Chowdhry*, and Baboo *Ram Churn Mitter*, for the Appellant.

Piffard, *Woodroffe*, Mr. *Twidale*, and Moonshee *Mahomed Yusoof*, for the Respondent.

The judgment of the High Court (1) was as follows:—

This appeal must be dismissed with costs.

It is quite clear on the evidence that the Judge was right in holding that the execution of the will of the late Moharanee Inderjit Koer was sufficiently proved. No other conclusion could have been come to on the evidence, as there is no reason for impugning the truthfulness of the witnesses: we are, therefore, unable to interfere with the finding of the Court below.

It is, however, contended that the Judge had no jurisdiction to grant this probate. It appears that the deceased had immoveable property situated in the jurisdiction of the Judge within the meaning of section 244 of the Wills Act.

The petition of objection put in on behalf of the appellant does not attempt to deny that the property mentioned in the schedule annexed to the will was in the possession of the Moharanee. All that the objection says is, that this property was in

(1) AINSLIE and BROUGHTON, *J.J.*

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Judgment.

her possession as a part of the estate of Moharaja Het Narain Singh, and he contends that no portion of it is, or ever was the stridhun of Moharanee Inderjit Koer. If there was property in the possession of the testatrix at the time of her death, which was claimed by her as being in her possession in her own right, it was not for the Court, in considering whether probate should be granted or not, to enter into the question whether the title, under which she held the property, was good or bad. It is sufficient for the purpose of giving jurisdiction under Act X of 1865 that property claimed as her own should be actually in the possession of the deceased.

Another objection was taken under section 51, but the evidence appears to us to dispose of that completely.

Lastly, it is said that under any circumstances the grant of probate should be made conditional upon the applicant furnishing good and sufficient security under section 256.

The uniform practice of this Court in granting probate under Act X of 1865 has been not to take a bond from the executor named in the will; and we see no reason for departing from this practice.

[CIVIL APPELLATE JURISDICTION.]

ROY DHUNPUT SINGH BAHADUR (PLAINTIFF) . . . . . APPELLANT;

AND

SHAM SOONDER MITTER AND OTHERS . . . . . (DEFENDANTS) RESPONDENTS.

1879
June 12th.

No. 2273 of 1878.

Res judicata—Suit for Arrears of Rent against purchaser from defendant in former suit.

Pending the delivery of judgment in a suit, against the registered putnidars, for arrears of rent, the defendants transferred their interest in the putni to A. An application was made to have A made a party; but this was refused, and a decree given for the plaintiff. Subsequently a fresh suit was brought against A for the same arrears. *Held*, that inasmuch a suit for arrears of rent may be brought either against the registered putnidars, or the purchaser from them, the subsequent suit must be treated as a suit against a defendant, severally liable, with the defendants in the original suit, for the same debt, and, accordingly, that it was not barred, provided the decree in the other suit were not fully satisfied.

APPEAL from a decision passed by the District Judge of Beerbhoom, reversing the decree of the Moonsiff of Doobrajpore.

Baboo *Sreenath Doss*, and Baboo *Gooroodoss Banerjee*, for the Appellant.

Baboo *Hurrymohun Chuckerbutty*, for the Respondents.

The facts will be found to be sufficiently set forth in the following judgment of the Court (1):—

The plaintiff is the owner of a fractional share of a zemindary, called hât Rasoba, which is let in putnee in the names of the first three *pro formâ* defendants, they being registered in the zemindar's sherista as the putnee talookdars. The plaintiff also had a share (4 annas) in this putnee. For his share of the arrears of rent of the putnee in respect of the years 1280-81

(1) MITTER and TOTTENHAM, *J.J.*

1879

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Judgment.

and 1282, deducting the quota of the rent payable by himself, the plaintiff brought against the aforesaid defendants, the suit No. 8 of 1877. The fourth *pro formâ* defendant intervened in that suit, alleging that he had acquired by purchase a 6 annas share of the putnee in question, and therefore the suit should have been brought against him also.

He was made a defendant before the suit was finally disposed of. The plaintiff, it is alleged, came to know that the remaining share of the first three defendants aforesaid had been purchased by the principal defendant in this case, viz., Sham Soonder Mitter. The plaintiff at first applied to make Sham Soonder party to that suit, but his application was refused. Then he made another application to withdraw from it, with leave to institute a fresh action. This application was also refused, and a decree was passed against the four persons who are *pro formâ* defendants in this suit.

The plaintiff has brought this suit to recover arrears of rent, and the road cess of the years 1281 and 1282 from Sham Soonder, the principal defendant, in proportion to the share purchased by him, alleging that he does not wish to enforce the decree passed in the suit No. 8 against the defendants, whose interest the principal defendant, Sham Soonder, has purchased.

The Moonsiff decreed the claim, but on Sham Soonder's appeal the District Judge has reversed that decree, and has dismissed the suit, holding, that under the circumstances stated above, a second suit is untenable.

It is contended before us in this second appeal that the decision of the District Judge is erroneous in law. We think this contention is valid.

In support of the view of the law taken by the lower Appellate Court, the learned pleader for the respondent, Sham Soonder, relied upon two decisions of this Court, reported in 10 B. L. R., 200—*Nuthoo Lall Chowdhry*, vs. *Shoukee Lall*, and I. L. R., *3* Cal., 353—*Hemendro Coomar Mullick* vs. *Rajendro Lall Moonshee*. These cases are quite distinguishable. They have laid it down that in the case of a joint contract or joint wrong doing, a decree obtained against one of the promisors or wrong doers is a bar to any fresh suit against the others. The ground upon which this decision rests is, that in both these cases the obligation or

liability of the joint promisors or wrong doers, is single and undivided. Therefore, there is one cause of action, and as soon as it is sued upon and a decree obtained, it is satisfied and exhausted. But these cases also show that the same rule of law does not apply where the obligation is joint and *several*. In this latter case it has been held that a decree obtained against one of the promisors *without satisfaction*, is no bar to a suit against another.

In the present case, the relative position of the principal defendant, Sham Soonder, to the defendants whose interests he has purchased, does not resemble that which exists between joint contractors, but rather resembles that which exists between persons who have made themselves severally liable to perform a particular contract.

If Sham Soonder had been sued along with his predecessors in title in the suit No. 8 of 1877, the plaintiff could not have obtained a joint decree against them all. The zemindar has the right either to sue the registered talookdar or the purchaser from him; but he cannot make them jointly liable. That being so, we are of opinion that the present suit is not barred by reason of the decree passed in the suit No. 8 of 1877, provided that the claim be not fully satisfied under that decree. It will be for the Court to take care that the plaintiff be not allowed to realize the same amount under two decrees. We, therefore, reverse the decision of the lower Appellate Court, and remand the case to that Court for the trial of the remaining issues. Costs to abide the result.

[CRIMINAL APPELLATE JURISDICTION.]

1879
June 20th.

IN THE MATTER OF PYARI LALL AND ANOTHER APPELLANTS

Evidence Act, I of 1872, *section* 33—"*Incapable of giving evidence*"—*Discretion of Court.*

The words "incapable of giving evidence" in section 33 of the Evidence Act, I of 1872, denote an incapacity of a permanent, not of a temporary kind; and where a witness is proved to be incapable of giving evidence, the Court has no discretion as to admitting his deposition. But, where the absence of a witness is casual or due to a temporary cause, the Court has such a discretion "if his presence cannot be obtained without an amount of delay or expense, which, under the circumstances, the Court considers unreasonable."

APPEAL from a conviction passed by the Sessions Judge of Gya.

The appellants in this case were Pyari Lall, Inspector of Police, and Modan Singh, a Constable, both of whom had been convicted, by the Sessions Court of Gya, of the offence of abetting the fabrication of false evidence, and sentenced, the one to five years rigorous imprisonment, and the other to three years rigorous imprisonment, under section 195, joined with section 109 of the Indian Penal Code. The fabrication consisted in this, that they caused a gun, part of the proceeds of a dacoity committed on the 2nd June 1878 in the house of one Ram Pershad Lall, to be found in the possession of one Bodhoo Doosad, so as to make it appear that he, the said Bodhoo, took part in the dacoity.

In respect of the one charge, of which the prisoners, appellants, were found guilty, the assessors were divided in opinion, one assessor pronouncing for a conviction and the other for an acquittal. At the trial before the Sessions Judge the deposition of a Mr. Clark, the Assistant Superintendent of Police, taken before the Committing Magistrate, was admitted in evidence, Mr. Clark being himself unable to attend the Court until after the witnesses for the prosecution had been examined. It appears

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that on the 21st March 1879 the Civil Surgeon, Doctor Muller, was examined and said, "He (Mr. Clark) is at present suffering from small-pox. He is not in a condition to attend Court and to give evidence. Perhaps Mr. Clark will be able to give evidence without injury to himself, or anybody else, in a week or so." The case for the prosecution closed on the 25th idem, but on the 2nd April, Dr. Muller, being called as a witness for the defence, deposed as follows:—"I think that Mr. Clark, Assistant Superintendent of Police, is now capable of giving evidence in Court without injury to his health."

In dealing with the charge upon which the prisoners were found guilty, the Judge says:—"In fact this part of the case must stand or fall on the simple question whether the evidence of Mr. Clark, Assistant Superintendent of Police, can be accepted as true;" and then, after discussing the question of the admissibility of Mr. Clark's evidence, and declaring it to be admissible, he further adds:—"But when that evidence (Mr. Clark's) is considered in connection with the evidence of Kishen Dutt and Bodhoo Doosad, and of Wazir Ali and Tulsi Singh, I do not think that it can properly be rejected."

In appeal the first point raised was, that as Mr. Clark could have given evidence before the Court of Sessions, that Court was bound to examine him, and, in lieu of his oral testimony, could not accept the evidence which he gave before the Committing Magistrate.

Jackson, M. Ghose and Mr. *C. Gregory*, for the Appellants.
Piffard, for the Crown.

The judgments of the Court (1) as to the admissibility of the evidence of Mr. Clark were as follows:—

MORRIS, *J.*:— MORRIS, *J.*

It is contended that Mr. Clark was not incapable of giving evidence within the meaning of section 33 of the Evidence Act, and that considering the temporary character of Mr. Clark's illness, and the extreme importance attaching in the Judge's estimation

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MORRIS, *J.*

to Mr. Clark's testimony, the Judge ought to have adjourned the trial for a few days, in order that Mr. Clark might be examined orally. I think that this contention is right, and that the Judge has put a wrong construction upon the terms "incapable of giving evidence." I understand the words to denote incapacity of a permanent character, and not of a momentary or temporary character. The word "incapable" naturally carries this meaning with it. The allocation in the section of the words with the other conditions of an absolute and permanent character, viz., that the witness is dead or cannot be found, or is kept out of the way by the adverse party, confirms this view, and a still further confirmation is found in the fact that the last clause of the section seems expressly intended to meet the case of temporary incapacity, it being left to the discretion of the Court to determine whether the delay and expense consequent upon an adjournment for the purpose of procuring the presence of a witness are likely to be so great that it would be unreasonable to incur them. As, then, Mr. Clark was incapable of giving evidence within the meaning of the section, and no unreasonable delay or expense would have been incurred in procuring his presence, I am of opinion that the deposition which he gave before the Committing Magistrate was improperly admitted, and must be excluded from consideration. As to the further objection that under section 283 of the Criminal Procedure Code, no sentence passed by a Court of competent jurisdiction shall be reversed or altered on appeal on account of the improper admission of any evidence, it is clearly met by the proviso contained in the latter part of the section, because the prisoners would certainly have been materially prejudiced in their defence by being unable to cross-examine Mr. Clark in person. A suggestion has also been made that this Court, exercising the discretion allowed to it under section 282 of the Criminal Procedure Code, might even now, at this stage of the case, admit Mr. Clark's recorded deposition, as Mr. Clark himself is not in the country and cannot be produced for the purposes of examination. We cannot, however, adopt this suggestion. One grave objection to it arises upon the medical testimony, which shows the absolute necessity of Mr. Clark's personal examination in Court. Mr. Clark's memory is described

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as seriously impaired from the effects of an accident which occurred 15 months previous. It is obvious that, unless the Court had an opportunity of judging of the then state of his memory, any statement of his made on the 15th November, relative to the identity of an article seen by him on the 15th of June previous, would be of little or no probative value. Excluding then the deposition of Mr. Clark, it remains to consider whether there is other sufficient evidence on the record to support the conviction. [The learned Judge here examined the other evidence on the record, and then concluded as follows: "It seems to me clear that, but for the corroboration afforded by Mr. Clark's testimony, he would never have convicted the prisoners upon the evidence of these four men. I have already explained the reasons why Mr. Clark's evidence before the Committing Magistrate must be discarded. Dealing, therefore, with the remaining evidence on the record, I can come to no other conclusion than that it is entirely unworthy of belief, and that the conviction must be set aside. We accordingly set aside the conviction and direct that the prisoners be discharged."]

WHITE, *J.*

WHITE, *J.*:—

The first question is, whether the deposition of Mr. Clark, made before the Committing Magistrate, was properly admitted in evidence. The Judge has admitted it under the provisions of section 33 of the Indian Evidence Act, upon the double ground that the witness was incapable of attending to give evidence, and also that his presence could not be obtained without an amount of delay or expense, which, under the circumstances of the case, the Judge considered unreasonable. I am of opinion that on neither ground is the deposition admissible. The Civil Surgeon, who was examined on the 21st of March, deposed that Mr. Clark was then suffering from small-pox, and was not in a position to attend Court and give evidence, but might perhaps be able to attend in a week or so. The illness, therefore, from which the witness was suffering was of a casual and temporary character, and this further appears to have been the case from the evidence of the same Civil Surgeon, who, in the course of this protracted trial, was again called on the 2nd

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April, twelve days after his first examination, to speak to the state of health of one of the accused. On that occasion the Surgeon was again questioned about Mr. Clark's state of health, and deposed that he thought Clark could give evidence in Court without injury to his health, though it might be dangerous to keep him long in Court or subject him to a protracted cross examination.

The words "incapable of giving evidence" in section 33 of the Evidence Act are the same as the Legislature has previously used in the 32nd section of the Act, and mean, in my opinion, incapable from some cause, which the evidence shows to be, of a permanent character. That this is the true interpretation appears to me to be shown by two considerations:—First, that the Legislature has provided for the case where the absence of the witness is casual or due to a temporary cause in the last words of the clause, which are these: "If his presence cannot be obtained without an amount of delay or expense, which, under the circumstances of the case, the Court consider unreasonable." If it were intended that the words "incapable of giving evidence" should embrace cases where casual or temporary illness prevented the production of the witness, there would have been no occasion for the words at the end of the first clause of the section to which I have referred.

Secondly, the Court has no discretion under section 33 as to admitting a deposition when the witness is proved to be "incapable of giving evidence." Such a witness is in the same category as one who is dead or cannot be found, or is kept out of the way by the adverse party, and his deposition is declared by section 33 to be relevant, and must therefore be admitted. The Legislature could hardly have intended that the Court should exercise no discretion in admitting the deposition of witnesses who could not be produced at the time of the trial owing to a temporary cause, and yet such would be the result of construing the words "incapable of giving evidence" as including casual illness.

We have been referred to certain English authorities upon the meaning of the words "so ill as not to be able to travel," which are to be found in 11 and 12 Vic. 42, section 17. But these words are so different from those which we are now considering,

that the authorities cited are of little or no assistance upon the question before us. On the other hand, I may refer, in support of the view that I have taken, to 1 *Taylor on Evidence*, 6th edition, page 60. In enumerating the cases in which the common law regards a witness as incapable of being called, and his deposition as admissible in consequence, that text writer mentions the case where the witness is permanently sick, but not the case where he is casually or temporarily sick.

As regards the second ground, in which the Judge has admitted Mr. Clark's deposition, we have to determine whether the Judge exercised a proper discretion. This is to be governed by three considerations—the delay, the expense, and the circumstances of the case.

The evidence shows that the delay that would have been occasioned by waiting till Mr. Clark could be produced as a witness was probably about a fortnight. As regards the expense, if by that word is meant expense in obtaining Clark's attendance, which is the natural meaning of the word when taken in connection with the context, there would have been no expense worth mentioning, for Clark lived or was staying within a short distance of the Court. It is contended, however, that the expense contemplated by section 33 is not confined to that meaning, but also includes the expense which would be incurred if the alternative course of adjourning the trial had been adopted. There are some dicta of PHEAR, *J.*, in the case of *Reg.* vs. *Lukhun Santhal*, 21 W. R., Cr. Rul., p. 56, which apparently tend to support the contention. I pronounce no opinion, whether the expense contended for may, or may not be properly taken into account by the Judge in exercising his discretion; but assuming that it may be, I think that in the present case there is no evidence that the adjournment of the trial for a fortnight would have been attended with an unreasonable amount of expense, or even any considerable expense. I come now to the circumstances of the case. Of these one of the chief, which the Judge has and ought to weigh, is the nature and the importance of the statements contained in the deposition. It would be unreasonable to incur much delay and expense where the facts spoken to in the deposition are of the nature of formal evidence for the prosecution, or supply some link in the case for

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the prosecution as to which little or no dispute exists, or are facts to which other witnesses speak besides the deponent, and which witnesses are produced at the trial.

On the other hand, it might be very reasonable to submit to much delay and considerable expense, when the evidence of the deponent is vital to the success of the prosecution, or has a very important bearing upon the guilt of the accused. That Clark's evidence falls under the latter description is obvious from the remark of the Judge. He says: "The case of Bodhoo Doosad (which is the one in which the conviction has been had), must stand or fall on the simple question whether the evidence of Mr. Clark can be accepted as true."

No doubt the Judge afterwards modifies this and attaches weight to the testimony of four other witnesses who were produced for the prosecution, for he says, after enumerating fifteen objections which had been urged against the trustworthiness of Clark's evidence: "If Clark's evidence had stood by itself, these objections would have had considerable weight. But when the evidence is taken in connection with the evidence of Keshoo Dutt and Bodhoo Doosad, and Wazir Ali and Toolsi Singh, I do not think it can properly be rejected." Still, the Judge clearly attached very great importance to Clark's evidence, and why this was so, is clear, for the main question in the case is, whether a particular double-barrelled gun, which is alleged by the accused to have been found in the possession of Bodhoo Doosad at the time of his arrest, was in the possession of the accused some few days previous to the arrest. The prosecution have, therefore, to establish that the accused had possession of a double-barrelled gun at the latter time, and that it was the same gun as the accused stated to be afterwards found with Bodhoo Doosad when arrested. Clark's statements are directed to the proof of these facts. Their satisfactory proof is vital to the prosecution; in fact they constitute the pinch of the case.

I am of opinion that the Judge ought not to have held that the delay and expense of obtaining Clark's presence as a witness was unreasonable under the circumstances of the present case. He should have postponed the trial for the attendance of Mr. Clark, and ought not to have admitted his deposition. In *Reg.* vs. *Mowjan*,

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20 W. R. Cr. Rul., 69, MACPHERSON, *J.*, in 1873, made the following remarks, in which I entirely concur: "Section 33 of the Evidence Act gives the Court new powers, which require to be exercised with great caution. There is no doubt that it is still necessary, (just as much as ever it was) to produce every witness at the trial, unless it is proved to be either actually impossible to produce him, or to be so difficult to do so that it is under the circumstances unreasonable to insist on his production."

I agree, therefore, with my brother MORRIS in rejecting Mr. Clark's deposition. As regards the rest of the evidence for the prosecution, I also agree that it is not such as we can safely act upon, and that the conviction, therefore, cannot be upheld.

[CIVIL APPELLATE JURISDICTION.]

MUSSAMUT HUNSBUTTI KOERAIN AND OTHERS (DEFENDANTS) . . . . . APPELLANTS;

AND

ISHRI DUT KOER AND OTHERS (PLAINTIFFS) . RESPONDENTS.

June 24th.

No. 14 of 1879.

Hindu Widow, Power of, to dispose of accumulations of profits from husband's estate—Accumulations, Property acquired by Hindu widow from —Hindu Wills Act—Declaratory Decree.

A Hindu died in 1858, leaving two widows and a daughter. By a deed, dated 21st December 1873, his widows conveyed absolutely to the daughter certain property set out in three schedules: the first comprising property described as left by their husband; the second, property acquired by them by purchase from accumulations of the profits of his estate; and the third, property of both descriptions.

The daughter having died, leaving a minor daughter, a suit was subsequently brought by the reversionary heirs of the deceased father, against the widows and the infant grand-daughter for a declaration that the deed did not and could not at any time affect their reversionary interest. *Held*, that inasmuch no immediate relief could be granted it, was unnecessary under the circumstances to make a declaratory decree.

The Court will not in a declaratory suit decide intricate questions of law when no immediate effect and possibly no future effect can be given to its decision, and when the postponement of the decision to the time when there may be before the Court some person entitled to immediate relief (if the decision is in favour of the plaintiff) will not prejudice his rights in any way.

Semble.—A suit so far as it is brought to set aside such an alienation by Hindu widows of property acquired from accumulations of the profits of the life estate of Hindu widows will not lie.

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Quare.—Whatever the law may have been formerly, whether having regard to the Hindu Wills Act, that Act does not enable a Hindu widow by will to dispose of all accumulations from the estate in her hands.

REGULAR APPEAL from a decision of the First Subordinate Judge of Tirhoot.

In this suit, which was filed on the 11th of July 1876, the plaintiffs, who were the reversionary heirs of one Budhnath Koer, who died in 1858, sought to have a certain deed, dated 21st December 1873, declared void so far as it purported to affect their reversionary interest in the estate of the deceased.

Budhnath was one of the four sons of Madho Koer, but was separate in estate from his brothers whose representatives the plaintiffs were. On his death he left him surviving two widows, and a daughter, Dyji, the wife of Kissori Ojha.

By the deed in question, certain property, alleged to have belonged to the estate of Budhnath, together with property said to have been acquired by the widows from the accumulated profits of the estate in their hands as Hindu widows, was conveyed absolutely with immediate possession to Dyji. Certain other property of both descriptions was also conveyed to her, subject to a life interest in the widows.

Dyji died, leaving an infant daughter, Bechni, and the property was taken possession of, on her behalf, by Kissori Ojha as her guardian.

The Subordinate Judge granted a decree.

The defendants appealed to the High Court.

Bahoo *Mohesh Chunder Chowdhry*, Baboo *Chunder Madhub Ghose*, and Baboo *Aubinash Chunder Banerjee*, for the Appellants.

Mr. *R. E. Twidale*, and Baboo *Hem Chunder Banerjee*, for the Respondents.

The following judgments were delivered by the Court (1) :—

AINSLIE, *J.*

AINSLIE, *J.*:—

Budhnath Koer died leaving two widows and a daughter. He was one of four brothers, but separate in estate from the others. The plaintiffs are the representatives of these brothers,

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and the widows and daughter's minor daughter are the defendants in this suit.

On the 21st December 1873 the widows executed a deed of gift in favor of the daughter Dyji, who has since died. By this instrument they gave her immediate possession of the properties mentioned in the 1st and 2nd schedules annexed thereto; the properties mentioned in the 3rd schedule were to be retained by them for life without the power of alienation, but on their deaths they were to become absolutely vested in the daughter.

The properties in the 1st schedule are described as left by their husband, those in the 2nd are described as self-acquired, and those in the 3rd are of both kinds.

Some contention has arisen upon the meaning of the words "Maksoolsa Khas," ("self acquired,") and it was suggested by the appellants that these words, upon which the plaintiffs in part found their case as setting up a title adverse to them, do not necessarily imply that the properties so described were purchased out of the separate funds or stridhan of the donors, and that consequently there is nothing in them which the plaintiffs can object to, as attacking their title as reversioners, and giving them a cause of action, but it is evidently clear that this contention cannot be maintained.

The words used are those always used to describe property so acquired that the acquirer has a complete power of disposal over it. It is evident from the body of the deed that they were used in this sense, because if they were intended to apply to property which, though acquired after the husband's death, was understood to be in the eye of the law part of the husband's estate, there would be no meaning in speaking of the daughter as "heir of our husband and of us, the declarants." She would in such case derive no title by inheritance from the widows, but only from her father. Further, it appears from the written statements of both parties and other portions of the record, that both parties understood these words to imply properties independently acquired by the widows which they were capable of alienating at will. The plaintiff's case is, that these were acquired from the profits of the estate, and therefore not self-acquired, and the defendant Sahni, who is the person really interested in defending this suit

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by her guardian, asserts in paragraph 6, that they are not portions of the estate of Budhnath, because they are the self-acquired properties of the widows. The attempt to interpret the words as only referring to the fact of the purchase by the widows, without implying purchase on their own separate account is vain, and it must be held that the widows did intentionally state in the deed of gift that they were sole and uncontrolled owners of these properties.

The plaintiffs have made both the widows and the granddaughter parties to this suit, but they admit that the life interest of the widows still continues, and will continue, so long as they may live.

They ask for a declaration: firstly, that the deed of gift is void as against them, the next heirs, after the determination of the life interest of the widows; secondly, that the interest of the minor is co-extensive with that of the widows; and, thirdly, that the properties described as self-acquired have been acquired out of the profits arising from the husband's estate, and are subject to the same rule of inheritance as the parent estate.

The cause of action is said to have arisen on two separate dates, the date of the execution of the deed and the date of the subsequent death of Mussamut Dyji. This has given rise to a good deal of comment, but is not a matter of importance as regards the decision of this appeal. Supposing the suit to be maintainable, it is on the ground that the widows and Dyji, now represented by her daughter Bechni, combined, by gift and acceptance, to sever a portion of Budhnath's estate with a view to mis-appropriate that portion and deprive the next heirs thereof.

The first part of the plaintiffs' prayer cannot be entertained. It was competent to the widows to make a gift of their life interest, and the fact of their making such a gift is in no sense prejudicial to the plaintiffs. So long as either widow survives, it is admitted by the plaintiff that there is a continuing life interest. The plaintiff affects to treat this as having reverted to the donors on the death of Dyji, and consequently denounces the possession of her husband on behalf of her daughter as a trespass; but although the gift is not in express terms to Dyji and her heirs, the absence of words of inheritance does not necessarily make the gift one for the

life only of Dyji. The words "in future we have and shall have on no account, directly or indirectly, any claim, right, demand or dispute with reference to the possession of, and title, to the aforesaid property granted in gift," clearly express the intention of the donors to make an absolute indefeasible gift of whatever interest they had in the property; and such interest, so long as it may last, is capable of being enjoyed by the heirs of the donee. And independently of this the possession of Bechni by her father, as derived from, and with the consent of the widows, is not *per se* that of one holding the estate adversely to those entitled to succeed to Budhnath. At the date of institution of this suit, there was no overt act on the part of Bechni's father to which the plaintiffs can point as certainly hostile. They simply expected hostility, but they cannot found a right of action on their own suspicions and expectations. There is nothing in the deed which is potently adverse to plaintiff's interest (unless it be with reference to self-acquired property, to be dealt with further on). It truly describes the widows as heirs to Budhnath, and with equal truth describes Dyji as the (then) next heir after themselves.

It does not, in express terms, purport to create a larger interest than, according to Hindu law, they and Dyji could legally be possessed of. The only words on which such a construction can be put are, "we * * * have made a gift of the undermentioned lands;" but these words must be read with the context, and seeing that the donors speak of themselves as taking as widows, and expressly refer to the shasters as determining the right of inheritance of the daughter, it is by no means necessary to construe these words as intended to convey more than the legal interest of the widows, or to assert more than the legal rights of the daughter. The same words as applied to the self-acquired property not being controlled by the reference to widows' and daughters' rights, but being read in conjunction with the assertion that this property was at their absolute disposal, may convey a larger interest in these lands; but that is still only because they convey the whole legal interest, whatever it may be, which the widows believed themselves to hold.

Similarly, the second part of the plaintiffs' prayer must be rejected. It may be that the father of the minor did, and does

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suppose himself to have on behalf of his daughter a larger interest than the widows and his wife could jointly possess, but he was free to entertain such a belief, and up to the date of this suit it is not suggested that he had done anything to give effect to it. It is said that he has subsequently caused his daughter's name to be registered on the Collector's books, but this clearly shows she was entitled to have done, as the person entitled to present possession, and even if this transaction could be noticed at all, we are not in possession of specific information about it, and are not at liberty to presume that he has done anything that he was not legally entitled to do.

In the third portion of their claim the plaintiffs aver that there has been an open attack on their reversionary interest by an attempt to sever a portion of the estate which should descend to them, and to treat it as not belonging to that estate, with the object of eventually depriving them thereof, and they claim to have it declared that the property so severed does belong to Budhnath's estate.

The defendants contend that such a declaration is not within the purview of section 15, Act VIII of 1859, by which this suit is governed; and that even if the Court is competent to make it, this is a case in which, in the exercise of a sound discretion, it should abstain from doing so. They further contend that the properties in Schedule II of the deed of gift to Dyji were self-acquired properties, purchased by the widows out of their separate funds, and that even if they were purchased with savings from the income of Budhnath's estate, the widows had a right to dispose of the income at their own pleasure, and although they have converted it into land, this does not alter the character of their right.

The general effect of section 15, Act VIII of 1859, was fully discussed in the case of *Kathama Natchiyar* vs. *Dora Singa Tever*, L. R., 2 I. A., 169; the conclusion is given at page 187. "It appears, therefore, to their Lordships that the construction which must be put upon the clause in question is, that a declaratory decree cannot be made, unless there be a right to consequential relief capable of being had in the same Court. They admit the qualification introduced by the case of Fyz Ali." (This

qualification, which does not affect the present suit, consists in the last words, "or in certain cases in some other Court.") The consequential relief here referred to, is present or immediate relief. Their Lordships cited the case of *Sreenarain Mitter*, 11 B. L. R., 171, in which it was said "it has been held that under 15 and 16 Vict., cap. 86, section 50, a declaratory decree cannot be made, unless the plaintiff would be entitled to consequential relief if he asked for it—(*Rooke* vs. *Lord Kensington*, 2 K. & J., 735.) The 15th section, Act VIII of 1859, is in similar terms;" and also the case of the *Rajah of Pachete*, L. R., 2 I. A., p. 83. "A similar clause in this country has been held to give a right of obtaining a declaration of title only on those cases in which the Courts could have granted relief if relief had been prayed for, and that doctrine has been applied to this clause in the Indian Act. Now, applying that test, in their Lordship's opinion, this suit is not maintainable."

They then point out, that the case of Fyz Ali,—11 B. L. R., 203, is not in conflict with this, as that suit was intended to prepare the way for a suit in the Revenue Court which alone could give the consequential relief that, but for the constitution of the Indian Courts, might have been asked for in the suit.

They then proceeded to examine the English cases, which clearly lay down that there must be a right to present relief which the Court could grant, if prayed for. Further on, a passage is cited from a judgment of the Madras Court, in which Chief Justice SCOTLAND said: "It has been decided by this Court that the rule of the Equity Courts in England isnot applicable to declaratory suits here, and it is now settled that a suit praying nothing more than a declaration of title is maintainable under the 15th section of the Code of Civil Procedure, although no consequential relief be grantable upon the declaration, if a good ground for seeking the protection of such a suit is shown to exist.' Upon this Sir J. COLVILE, delivering the judgment of their Lordships, remarks: "What I have already said on the part of their Lordships shows that they dissent from that position, &c., &c." Their Lordships further reject as unsound a reason for the exercise of the discretion to make a declaratory decree which had been put forward in certain cases, namely, the absence in India of the

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power to entertain a suit to perpetuate testimony, as to which it was observed that in no case is it a satisfactory reason. "The proper remedy for such a defect in the administration of justice, if it exists, is an act of the Legislature. It cannot be supplied by putting an erroneous construction, or a different construction, from that which prevails in other parts of India, upon a Statute which has no reference to the subject."

Having thus referred to the general rule their Lordships refer to a class of suits which is exceptional:—

"The arguments now under consideration are founded on the right of a reversioner to bring a suit to restrain a widow, or other Hindu female, in possession from acts of waste. Although his interest during her life is future and contingent, suits of that kind form a very special class, and have been entertained by the Courts *ex necessitate rei*. It seems, however, to their Lordships that if such a suit as that is brought, it must be by the reversioner with that object and for that purpose alone, and that the question to be discussed is simply between him and the widow, that he cannot by bringing such a suit get, as between him and a third party, an adjudication of title which he could not get without it."

The conclusion of the matter was, that even if the plaintiff had proved acts of waste against the widow, for which purpose it might have been necessary for him to prove a title sufficient to give him a *locus standi* in Court, that would not give him a right as against another defendant to have the question (of title to the estate after the widow's death) arising between them determined by a declaration.

This decision does not go so far as to bar a suit during the lifetime of a widow against her alienee to obtain a declaration that his interest is to determine with the life estate of the widow. Such suits are recognized by the Legislature; for by Article 124 of Schedule II of the Limitation Act of 1871, and now by Article 125 of Act XV of 1877, a period of limitation is provided for them, and they have been entertained. In the case of *Tekait Doorga Persad* vs. *Tekaitni Doorga Konwari*, L. R., 5 I. A., 149, before the Judicial Committee of the Privy Council, which was a suit of this nature, a declaratory decree was indeed refused,

but in the exercise of discretion and not because the suit could not be entertained. But although it may be that such suits can be brought, there is nothing in the judgment in the case of *Kathama Natchiyar* above referred to, which, as I understand it, gives the plaintiff a right to a declaration, and in the case of *Sreenarain Mitter* vs. *Kishen Soonderee Dassee*, 11 B. L. R., 171, their Lordships (p. 190) say :—"It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under all the circumstances of the case to grant the relief prayed for.

"There is so much more danger in India than here of harassing and vexatious litigation that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation."

Assuming that the present suit does not fail on the ground that it is inadmissible under section 15, Act VIII of 1859, I think, we ought, in the exercise of our discretion, to abstain from making a declaratory decree.

If the question of the widow's power to alienate property acquired out of savings from the income of her husband's estate had been concluded by authority, there would perhaps be no reason for doing so, but it seems to me that there is no authoritative ruling on the subject. There is a passage in the judgment of the Judicial Committee in *Mussamut Bhagbutti Daee* vs. *Chowdhry Bholanath Thakoor* (L. R., 2 I. A., 256) which may at first sight appear to treat the matter as beyond a doubt, but on examination I do not think it can be said to settle anything. In the first place it is to be observed that this passage beginning, "if she took the estate only of a Hindu widow" (p. 260), is not material to the decision, and is only illustrative of what had been said just before, that the interpretation rejected would *materially change* the nature of the estate taken by Chunderbuttee. Of this there can be no doubt; whatever the incidents of a Hindu widow's estate may be, it is certainly not identical with the interest of a female who takes a life-interest by gift or bequest, because, at least as to monies or properties acquired by the female tenant and not specifically disposed of by her, in the one case her husband's

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heirs, and in the other her own heirs, succeed, and as the judgment points out, the Hindu widow, under certain circumstances, has a power of alienation which the life-tenant has not.

Although the particular words "one consequence, no doubt would be, that she would be unable to alienate the profits, &c.," are not essential to the decision, they are not therefore to be neglected or put aside on slight grounds; but I think that with all respect to their Lordships, it is open to this Court to examine their dictum, and that we are not bound to accept it as beyond question. As I said before this passage is only by way of illustration, and it was not necessary to do more than indicate in a general way the difference in the positions of the Hindu widow and the life-tenant by grant. That the particular statement referred to cannot be taken to be conclusive appears to me clear from the context. It is said, "one consequence, no doubt, would be that she would be unable to alienate the profits;" but it is said a few lines further on, "she certainly would have the power of selling her own estate." The estate here alluded to is obviously her estate as widow, for the power to sell her husband's estate under certain circumstances had been already mentioned. But if she can alienate her widow's estate, this is simply alienating the profits.

Moreover, the words "she would be unable to alienate the profits," are immediately qualified by the addition, "or at all events whatever she purchased out of them would be an increment to her husband's estate, and the plaintiffs would be entitled to recover possession of all such property, real and personal." This qualification seems to me to show that there was no intention in their Lordships' minds to decide judicially at that time what the incidents of a Hindu widow's estate are. If the words "and left undisposed of at her death," had followed after "purchased out of them," the illustration would have been equally apposite, and would then certainly have been beyond doubt, but I venture to think that in cutting down the first statement "she would be unable to alienate the profits" which was clearly too wide; their Lordships may not have gone far enough; they may have over-looked the question which arises in this case. It was said in the judgment of this Court, then before them on appeal,

that "in cases of a widow enjoying the property of her deceased husband she is not entitled to alienate immoveable property or any property that she has purchased out of the profits of such estate any more than she can alienate the immoveable property itself of which that estate consists" (15 W. R. p. 64), and it is possible that this led to the statement in the judgment of their Lordships being in the form in which it is reported.

In the case of *Gonda Kooer* vs. *Kooer Oodey Singh*, 14 B. L. R., 159, decided in the previous year, their Lordships expressly reserved the question of the effect of a distinct intention on the part of a widow to appropriate to herself and sever from the bulk of the estate such purchases as she may have made, and I am not aware that in the fifteen months that elapsed between the delivery of this judgment and the judgment in *Bhugobutti Dayee's* case, any other appeal was decided in which the question was considered.

In my opinion, therefore, this judgment is not conclusive.

It seems to me that if it is within a Hindu widow's power to dispose of the surplus profits from her husband's estate remaining after due provision has been made for the duties which the widow is bound to perform, it must be equally within her power to do so, whether she does it at once as the profits reach her, or whether she allows them to accumulate.

Suppose that she has a surplus income of Rs. 1,000 per annum, and wishes to buy a property of the value of Rs. 5,000 to give to some one other than a reversionary heir of her husband. If she can dispose of the surplus at once, she can, by giving it for five successive years, enable the person intended to be benefited to buy the property. I can conceive no reason for not allowing her to accumulate the necessary funds to buy it herself and give it away. Indeed in this latter case the reversioner has an advantage, for if the widow happens to die without disposing of the fund or that into which it may be converted, it will come to him. On this point I think there is no difference of opinion; such property never passes as stridhan to the heirs of the widow, but goes, if undisposed of by the widow in her lifetime, to the heirs of her husband.

If the widow can make effective arrangements for carrying out her wishes, it is useless to say she cannot do so directly; it

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clearly is opposed to public policy to force her to adopt a circuitous course instead of a simple straightforward one, and, as already observed, it is not in the interest of the next taker of the husband's estate to do so.

If a distinction is to be drawn between current income and accumulations, where is the line to be drawn? When does the surplus cease to be part of the current income? There is no rule requiring a widow to make up her accounts at stated intervals and carry unexpended balances to the credit of the husband's estate. How are we to say that up to 31st December she is free to spend as she chooses the money in hand, but on the 1st January it lapses like an unexpended assignment of public money at the close of the financial year. Who is to audit her accounts? If she is accountable to the heirs of her husband not only for the safe custody of his estate but for the expenditure of the income, then I can understand that she is not free to give away immoveable property purchased out of the surplus—(I may say once for all that in speaking of surplus income, I assume that it is a *bonâ fide* surplus, and that the expenditure of it will not involve any improper alienation of the *corpus* to meet charges which a widow is required to provide for). Indeed in such case I do not see how she is at liberty to give away or squander any portion of the income, whether as cash or after it has been converted into property of any description.

In the case of *Kery Kolita* vs. *Moneeram Kolita*, (13 B. L. R., 1), Mr. Justice DWARKANATH MITTER, in the referring order at p. 6, speaks of the widow as nothing more than a trustee for the soul of her husband, and commenting on a passage of the Dayabhaga (Ch. XI, s. i., v. 61) says: "It is clear from this passage that every use made by a Hindu widow of the estate inherited from her deceased husband, which is not conducive to his spiritual welfare, is, under the Hindu Law, current in the Bengal School, an unauthorized act of waste." In the view taken by the learned Judge, a widow clearly cannot give away property purchased out of the profits of her husband's estate, whether the purchase-money be taken from current income or from past accumulations, but that view was expressly dissented from by the learned Judges who concurred with him generally on the

question before the Full Court—see the observations of Mr. Justice GLOVER at page 53, and Mr. Justice KEMP at page 76; and the learned Chief Justice Sir RICHARD COUCH (in whose judgment Justices MACPHERSON and PONTIFEX and I myself concurred) said a widow is not a trustee. She has the usufruct, as well as the property, in the thing inherited from her husband.

This is in accordance with the decision of a Full Benchin the case of *Govindmoney Dassee* vs. *Sham Lall Bysack*, (B. L. R., Full Bench Rulings, page 47.)

Sir BARNES PEACOCK then said (page 53) : Upon the whole, after considering all the cases upon the subject, we are of opinion that a conveyance by a Hindu widow, for other than allowable causes, of property which has descended to her from her husband, is not an act of waste which destroys the widow's estate and vests the property in the reversionary heirs, and that the conveyance is binding during the widow's life.

It is unnecessary to quote other cases; for it is now well settled that a widow can alienate her estate, *i.e.*, she can anticipate the profits; and, that she is answerable to any one for the way in which she expends the money so raised, provided that the reversionary estate is not diminished from what it was when it came into her hands, has never been held as far as I know.

But if she may create a fund for a specific purpose by anticipating profits, on what principle is she to be debarred from doing the same thing by accumulating them? I fail to see any. That money so accumulated, if unappropriated, is not capable of being inherited as stridhan tends to support Mr. Justice D. MITTER's view of the widow's right, but whatever may have been the views of Hindu commentators, we must now take it as settled by a long course of decisions that the Hindu widow is not restricted as he suggests in the enjoyment of her husband's estate. The fact that unappropriated profits or properties purchased and not disposed of in the widow's lifetime do not pass as stridhan may be explained on the theory that when a widow has at her death left money accumulated or property purchased out of surplus profits, and not appropriated to any person during her life, it was her intention to add such monies or profits to the estate, and to abstain from exercising her full rights over them.

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In the case of *Sreemutty Puddomonee Dossee* vs. *Dwarkanath Biswas*, 25 W. R., 335, Mr. Justice JACKSON, who delivered the judgment of the Court, said (page 340) :—"There are certainly no materials for a determination, whether she (the widow) bought out of current income or accumulations.* * * But we are inclined to think this enquiry unimportant, and to base our decision, if necessary, on a broader and clearer ground, viz., that Rashmony having purchased this land (if she did so) with monies derived from the income of her husband's estate then lying in her hands was competent afterwards to alienate her right and interest in whole or in part, to re-convert them into money, and to spend it if she chose."

This decision is in conflict with that of the same learned Judge (to which I was also a party) in the case of *Chowdhry Bholanath Thakoor* vs. *Mussamut Bhagabatti Deyi*, 7 B. L. R., 93, but it was then observed that no authority had been shewn on the other side, and I may further observe that of the two cases cited, viz., 9 W. R., 584, and 1 Agra, 219, I find on re-examination one to be opposed to the other, and to be opposed to the general statement of the law in the judgment, though it otherwise supported the judgment in the particular case. In the case in 7 B. L. R., 93, it was said, "and as regards the first of these classes of property, namely, those which appear in the *form of* immoveable property purchased from the accumulations made by Chunderbutti from the profits of the estate which she received, there are several decisions of which I may refer to, that in 9 W. R., 584, and another to be found in 1 Agra, 219—*Nihal Khan* vs. *Hur Churn Lall*, by which it has been distinctly held that in cases of a widow enjoying the property of her deceased husband she is not entitled to alienate immoveable property or any property that she has purchased out of the profits of such estate, any more than she can alienate the immoveable property itself of which that estate consists. No authority, whatever, has been shown to us on the other side; and it seems to me that these decisions are substantially in conformity with the Hindu law.

This view is supported by the Agra case, but the whole of that judgment on the point is contained in the following words:—

"Purchases with such funds will not belong to the widow otherwise than as the lands from which this money arose belonged to her." (In this case the widow had alienated, and the alienation was cancelled.)

But in the case in 9 W. R., 584, there had been no alienation by the widow, and the question was whether the property was *stridhun*.

The present learned Advocate-General, Mr. Paul, with Baboo Unoocool Chunder Mookerjee and Baboo Kali Prosunno Dutt, were for the Appellant, and the argument, as stated in the judgment, was that, although the widow *was allowed to make the fullest use of the usufruct of the estate while she lived,* whatever she left behind became the property of the next heir, and was not liable for the widow's personal debt.

This was the view taken by Mr. Justice GLOVER: "A Hindu widow with a life interest in her deceased husband's estate *would be entitled to make the fullest use of the usufruct of that estate,* and it seems doubtful under the late Rulings of the Privy Council, whether she could be in any way restrained, however wasteful her expenditure, so long as she kept within the limits of her income, and made no attempt at alienation." (Here the learned Judge obviously refers to alienation of the corpus, and this probably was overlooked when the case was quoted as an authority.) "If, on the contrary, she chooses to economize *she can, during her life time, give away her savings to any one she pleases;* but if she has left savings undisposed of at the time of her death, these would form part of the estate and go with that estate to the next heir of her husband. Mr. Justice KEMP said: "She (the next heir) succeeds to the residue of the estate after the widow's use of it. These accumulations cannot be considered to be the *stridhan* of the widow."

In the case in 7 B. L. R., 93, the particular properties (13, 14, 18, 19 in the schedule) with which the Court was dealing in the passage quoted above, were left undisposed of at the death of the widow Chunderbutti. So that, though the judgment in 9 W. R., 584, was clearly an authority on the question of how they were descend on the death of the widow, though not for the broad proposition laid down, there was indeed another set of

[illegible] properties to which the rule would have applied, but that the Court considered that the widow had special authority to deal with them, so that in fact the correctness of the rule was not essential to the decree made. In the case in 25 W. R., 335, Mr. Justice Jackson has not alluded to this case, though he has departed from the view therein expressed.

As at present advised, I am inclined to think the later view taken by the learned Judge to be a necessary consequence of the widow's power to alienate her husband's estate; but a difficulty occurs to me which has not been discussed. By the Hindu Wills Act, XXV of 1870, section 2, extending section 46 of Act X of 1865 to Hindus, and by section 3 of the former Act every person may dispose by will of that which he or she may alienate *inter vivos*, and this would seem to involve this consequence that a Hindu widow may keep property acquired from accumulations in her own hand up to her death, and then sever it from the estate of her husband, so that, although it will not pass as *stridhan* under Hindu law, she can secure that it shall pass as if the law regulating the descent of woman's property applied to it. This is an extension of a Hindu widow's dominion over property which she only holds for the estate of a Hindu widow which may be a logical consequence of the decisions as to the status of such persons, but which it is not easy to reconcile with what I believe to be the universal custom of the country.

It is unnecessary to go through all the cases on the subject of a Hindu widow's power of alienation. I have said enough to show that the question now before us is one of great difficulty and importance, and one that could not properly be decided without a reference to a Full Bench. It seems to me that we ought not to allow this suit to be protracted, and great additional expense to be incurred when it is quite possible that the widows or one of them may survive the plaintiffs, so that the estate may never vest in them, and the decision arrived at may prove no bar to further litigation.

The Privy Council have laid down the rule that a Court should not entertain a suit under section 15, Act VIII of 1859, when the object of it is to determine the title of the plaintiff as next heir

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after the death of a female holder, and I am inclined to say that it also should not do so when the object is to determine the title of the next heir to take, as belonging to the estate of the last male holder, property which at his death did not in any shape form a part of it, but it is not necessary to go so far as this at present; for the purposes of this appeal it is sufficient to say that the Court will not, in a declaratory suit, decide intricate questions of law when no immediate effect, and possibly no future effect, can be given to its decision, and when the postponement of the decision to the time when there may be before the Court some person entitled to immediate relief (if the decision is in favor of the plaintiff) will not prejudice his rights in any way.

I would therefore allow the appeal, and dismiss the suit with costs here and in the Court below.

BROUGHTON, *J.*

BROUGHTON, *J.* :—

I concur in the opinion that the plaintiff is entitled to no declaration so far as regards the property which is described in the deed as the estate of Budhnath. It appears to be settled law throughout India that a widow holding a Hindu widow's estate has a right to alienate to the extent of her own interest. This, so far as Lower Bengal is concerned, was decided in the case of *Gobindmani Dasi* vs. *Sham Lal Bysak*, B. L. R., F. B., 48.

Several decisions of the Courts in the other Presidencies are quoted in support of this proposition in Mr. Mayne's work on Hindu Law and Usage, section 544, and the judgments of the Judicial Committee of the Privy Council in the cases of *Mussamat Bhagbutti Daee* vs. *Chowdhry Bholanath Thakoor*, L. R., 2 I. A., 256 (see page 261); and of *Rajah Nilmony Singh* vs. *Kally Churn Battacharjee*, ib., 83 (see page 85), are to the same effect.

It follows, therefore, that, as the widows in the present case are alive, the alienation of their life interest in favor of the daughter of one of them and of her heirs, and the right of the granddaughter, the only child of the daughter now deceased to present possession, cannot now be questioned.

With regard to the properties which are described as self-acquired, the widows purported to separate them from the husband's estate, and to convey to the daughter Dyji and her heirs a

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larger interest than their life interest. This, coupled with the possession which the husband of Dyji took on her behalf, and which since her death he still retains and defends on behalf of her minor daughter, is an alienation beyond the power of the widows, if this property is really a part of the estate of their deceased husband.

That, in cases of dealing with the husband's estate by the widow, declarations have been made and may be made, appears to be established in the case of *Gobindmani Dasi* vs. *Sham Lal Bysak*, already cited. PEACOCK, *C.J.*, said: "Our decision will not preclude the reversionary heirs, even during the lifetime of the widow from commencing a suit to declare that the conveyance was executed for causes not allowable, and is therefore not binding beyond the widow's life. Nor will it deprive the reversionary heirs, during the lifetime of the widow, of their remedy against the grantor to prevent waste or destruction of property, whether moveable or immoveable, in the event of their making out a sufficient case to justify the interference of the Court."

In the case of *Raj Lukhee Dabea* vs. *Gokool Chunder Chowdhry*, 13 Moore's I. A., 224, the Judicial Committee say: "Some question has been made at the bar as to the right of a person who is a presumptive heir in reversion to question such a transaction; but their Lordships, if it were necessary to decide the point, would find it extremely difficult to overrule the many cases in which that right has been more or less recognized."

In *Kooer Goolab Sing* vs. *Rao Kurun Sing*, the nearest reversioner was charged as concurring in certain illegal alienations, and it was held that the next reversioner could sue to protect the estate—14 Moore's I. A., 193.

In the case of *Kathama Natchiyar* vs. *Dora Singa Tever*, L. R., 2 I. A., 169, the Judicial Committee refused to make a declaratory decree. The case for the plaintiff was, that the first defendant, favoring the second defendant's title, and concerting with him in opposition to the plaintiff, had employed an agent and executed a power-of-attorney to him, for the purpose of assisting the second defendant to possess himself of the zemindary, and withhold possession after her death. On this, their Lordships remark:—"It can, from the very nature of the instrument, operate

only during the zemindar's lifetime, and we are not to assume that any act will be done under it which the plaintiff would have a right to impeach. But if any such act is done under it, as, for instance, if she were to devolve the succession upon her son, so that his interest might become absolute, or the like, their Lordships, by their decision upon the present question, would by no means preclude the plaintiff from seeking to impeach that act, and to treat it as invalid" (pp. 189, 190.)

The 124th clause of the Schedule of the Limitation Act of 1871, which applies to this case, prescribes a period of twelve years from the date of the alienation within which a suit may be brought during the lifetime of a Hindu widow by a Hindu entitled to the possession of land on her death to have the alienation made by the widow declared to be void except for her life. The person "entitled to the possession of land on her death" must mean the person who, if he survived her, would be so entitled, for until the widow's death it cannot be said who would be her husband's heir.

The question then arises whether the property bought by the widows in this case forms part of the estate of the husband, or whether they can dispose of it?

It has been found by the Subordinate Judge, and his finding is supported by the evidence that the properties were purchased out of the profits of the husband's estate.

It appeared to me at first sight that the Judicial Committee had decided that property so purchased belonged to the parent estate. In the case of *Mussamat Bhagbutti Daee* vs. *Chowdhry Bholanath Thakoor*, L. R., 2 I. A. at pp. 260, 241, their Lordships observe; "If she (*i.e.*, the widow) took only the estate of a Hindu widow, one consequence no doubt would be that she would be unable to alienate the profits, or at all events, whatever she purchased would be an increment to her husband's estate, and the plaintiffs would be entitled to recover all such property."

I agree, however, in thinking with Mr. Justice AINSLIE that these words were used rather to show that the widow had more than a widow's estate under the deed which was to be construed in that particular case, than to lay down a general proposition of law. And, moreover, the property which had in that case been

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purchased out of the savings was not alienated by the widow who purchased it during her lifetime, but was left to descend to whoever was entitled to it at her death, and it was held that it belonged to the husband's heir, on the ground that she held it as a Hindu widow. The Judicial Committee held that she had a larger interest under a family settlement, but used the words I have already quoted. Two of the authorities cited by the learned Judge of the High Court, who delivered the judgment, appealed to the Privy Council, were instances of property not disposed of, or attempted to be disposed of, by the widow during her lifetime—they were, *Chundrabulee Debia* vs. *Brody*, 9 Suth. W. R., 584 (S. C.); 5 Wym. 335; and Vyavastha Darpana by Shamachurn Sircar, p. 64. A third, the case of *Nihal Khan* vs. *Hurchurn Lall*, 1 Agra H. C. Rep., 219, is not clear, as reported. It is not stated who were the parties to the suit, or under what circumstances and at what time the widow disposed of the property.

The power of her selling her own estate which the Judicial Committee in the same case L. R., 2 I. A., 261, concede to the Hindu widow, appears to be inconsistent with a restriction upon her dealings with the accumulations, or with property purchased during her lifetime with such accumulations, for until the income is accumulated, it is hers to do as she likes with it, and the fact that she lays it by cannot alter its character; nor, as it seems to me upon the authorities, does it affect her power to deal with it in her lifetime, although after her death, if she has not so disposed of it, it goes to her husband's heirs as an increment to his estate, and not to her heirs, as her separate property.

The case of *S. M. Soorjee Money Dossee* vs. *Denobundoo Mullick*, in 6 Moore's I. A., 526, where the question of a widow's right to accumulations was discussed upon demurrer, and in 9 Moore's I. A., 123, where it was finally decided, was not a case in which any question directly arose as to accumulations made by the widow herself. In that case there were two ikrarnamas or wills, or family settlements, under which one of the sons took an interest in family property. This interest was held to determine upon his death. The family, before his death, was joint, and accumulations were made while it was joint, and interest accrued on them after his death.

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The question was, whether his widow and heiress was entitled to a share in the accumulations, or whether they went under the will or settlement, with the corpus of the estate, to his four surviving brothers.

It was decided that the widow was entitled to a Hindu widow's interest in the one-fifth part of the accumulations which accrued during the lifetime of her husband, and to the subsequent accumulations of interest.

It is to be observed with reference to this case that the Supreme Court gave the widow a Hindu widow's interest in the accumulations made between the death of the testator and of her husband, and also in the subsequent interest on those accumulations. Her Counsel on appeal contended successfully that she was entitled to the interest, which had accrued since her husband's death, absolutely, and this must have been on the footing of a Hindu widow's right to enjoy absolutely the whole of the income of her deceased husband's estate, and to an entire dominion over such income. There was no contention made by the Counsel for the respondent against this further claim.

In the case of *Bissonauth Chunder* vs. *S. M. Bama Soondery Dossee,* 12 Moore's I. A., 41, the accumulations after the death of the testator were held to belong to the sons in like manner, irrespective of the directions in the will which passed the corpus of the joint estate to them, and the widow of one of the sons, who were five, and who were likewise entitled to the corpus with benefit of survivorship under the will, was held entitled to one-fifth of the accumulations made between the death of the testator and of the husband, and one-fifth of the subsequent interest thereon in both cases as heir to her husband under the Bengal Law. All was given to her for the estate of a Hindu widow, but no question was raised as to any distinction between the accumulations before the husband's death and after it.

These cases were followed in the case of *Panna Lal Seal* vs. *Srimati Bama Sundari Dasi,* 6 B. L. R., 732.

In a subsequent case—*Gonda Kooer* vs. *Kooer Oodey Singh,* 14 B. L. R., P. C., 159, the question was whether purchases made by a Hindu widow, out of the proceeds of her husband's estate, formed an increment to that estate, or were disposable by

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the widow by gift during her lifetime or by will. The case was one which had arisen in the North-West Provinces, and the property purchased, if disposed of at all, was disposed of by the will of the widow. Their Lordships of the Judicial Committee observed:—"It has been further argued that even if the presumption be that such purchases are increments to the husband's estate, it may be rebutted by clear proof of her intention to sever them from that estate, and to treat them as made in her own right, whereupon she acquires the power to dispose of them, and that such intention is proved in this case. The principal authority relied on by the appellant was *Sreemutty Soorjee Money Dossee* vs. *Dinobundoo Mullick*, 9 Moore's I. A., 123, where it was declared by this Board varying the decree of the late Supreme Court at Calcutta, that the widow was entitled absolutely in her own right to all such interest and accumulations as, since the death of her deceased husband, had arisen from one-fifth part of the accumulations which she had before been declared entitled to hold and enjoy as a Hindu widow in the manner prescribed by Hindu Law."

"Although the decree in that case made a distinction between the principal funds to which the widow was entitled as heiress of her husband, and the accumulations of income which had arisen therefrom since his death, and in terms treated her *right* to the latter as absolute and unqualified, it is nevertheless to be observed that there were no questions in that case as to any conflicting rights between her heirs and the reversionary heirs of her husband. The case, moreover, was governed by the law of Bengal, and the accumulations of income, to which the widow was declared absolutely entitled, were the produce of a reserve fund. Their Lordships cannot, therefore, regard this case as a conclusive, or even a direct authority upon the question raised on this appeal."

Their Lordships then proceeded to consider the evidence bearing upon the widow's intention in dealing with the property she had thus purchased, and after finding that she had evinced no intention to sever it from the parent estate, proceeded to say:

"It therefore becomes unnecessary to decide what might have been the effect of a distinct intention on her part, if it had

been proved, to appropriate to herself and to sever from the bulk of the estate such purchases as she had made, with a view of conferring them on her adopted son."

In the present case the widows have done more than appropriate to themselves and to sever from the bulk of the estate such purchases as they have made with a view of conferring them upon the daughter and her heirs. They have actually so conferred them, so far as their power to do so extends.

In the case of *S. M. Puddomonee Dossee* vs. *Dwarkanath Biswas*, 25 Suth. W. R., 335, Mr. Justice L. S. JACKSON, says :— "If the property was not purchased with private funds of Rashmonee's own, there are certainly no materials for determination whether she brought it out of current income or accumulations, the former is quite as possible as the latter. But we are inclined to think this enquiry important, and to base our decision, if necessary, on a broader and clearer ground, viz., that Rashmonee having purchased this land (if she did so) with monies derived from the income of her husband's estate then lying in her hands, was competent afterwards to alienate her right and interest in whole or in part, to reconvert them into money, and to spend it if she chose."

Mr. Justice MACPHERSON, on the other hand, in the case of *Grose* vs. *Amirtamayi Dasi*, 4 B. L. R., O. J., at p. 42, observes, that "although the theory of the Hindu Law is that the income of the husband's estate shall go to the widow for her maintenance, and for the performance of pious duties, that theory by no means necessarily embraces the large lump sum of accumulations. According to all the older authorities on Hindu Law, accumulations should be treated in the same way as the corpus; and I think they should be so treated now, in the absence of any distinct authority to the contrary."

These authorities, however, were dealt with in the case of *Gobind Mani Dassi* vs. *Sham Lal Bysak*, B. L. R., F. B., 48, and were held to be insufficient to prevent the widow making an alienation which should be valid during her own life.

It appears to me that the question before us is one which is not to be determined in a suit for a declaratory decree, that it is by no means clearly established by the authorities whether the

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widow had, or had not power to alienate for a period extending beyond her own life, property which she had purchased from savings of income derived from her late husband's estate made after his death, and in which she was entitled to a Hindu widow's interest. I am inclined to think that the authorities in favor of her power to do so must prevail; if so, no declaration should of course be made against their validity. If we were bound to make a decree, the matter should, I think, be referred to a Full Bench, as there seems to be a direct conflict between the case of *Grose* vs. *Amirtamayi Dassi* and of *Puddomonee Dassee* vs. *Dwarkanath Biswas*. But, as we have a discretion in the matter, it would be better to abstain from making any declaration.

[CRIMINAL REVISIONAL JURISDICTION.]

June 13*th.*

No. 125 of 1879.

SHEIKH ERAD ALI . . . . . PETITIONER;

AND

NUSIBUN NISSA BIBI . . . . . OPPOSITE PARTY.

Criminal Procedure Code, section 147—*Dismissal of complaint.*

A charge of theft was preferred by the petitioner on the 7th October 1878, before the Police, who thereupon instituted enquiries which subsequently resulted in their finding the charge unproved. Meanwhile, on the 15th October, the charge was repeated in a complaint before the Magistrate of the District, who directed the complainant and his witnesses to attend on a particular day, but subsequently, without having examined them or the complainant, referred the matter to the Sub-Deputy Magistrate. That Officer having reported the charge to be false, the Magistrate, on the 9th November, wrote upon the Police Report, which had meanwhile, on the 26th October, been submitted to him, the following direction, viz., "shew as false."

On the 19th November a counter-prosecution under sections 211, 182 and 500 of the Penal Code was sanctioned, and eventually on the 22nd May 1879, resulted in the petitioner being convicted. While the counter-prosecution was pending, the petitioner on the 22nd April applied to the Magistrate to proceed with his complaint according to law, but was informed that his complaint was dismissed. On the following day the Magistrate recorded the following order: "Dismissed in accordance with my decision recorded in the Police Report under section 147 of the Criminal Procedure Code."

Held, that the complaint had been improperly dismissed, and that the order of the Magistrate, dated 23rd April 1879, must be set aside.

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THIS was an application to set aside an order of the Magistrate of Howrah, made on the 23rd April 1879, dismissing a complaint preferred by the petitioner against one Nusibun Nissa Bibi. The circumstances which gave rise to the application will be found reported in the case of *Nusibun Nissa* vs. *Sheikh Erad Ali*, ante, p. 413.

A rule to show cause why the order in question should not be set aside was made on the 14th May, and now came on for hearing.

Baboo *Kali Churn Banerjee*, in support of the rule.

The judgment of the Court (1) was follows:—

The petitioner laid a charge of theft against Nusibun Nissa Bibi and others at the Golabari Police Station, on the 7th October 1878. The Police made some enquiry into the case, but as they did not send it up to the Magistrate as speedily as the petitioner thought they ought to do, he laid a complaint before the Magistrate of Howrah on the following 15th October, and on the 30th of the same month the Magistrate made an order that the petitioner should bring his witnesses or have them summoned within five days. On the 6th November, the petitioner produced his witness, but neither he nor the witnesses were examined. The parties were discharged on their own recognizances to attend on the 8th of November. On that day the Magistrate again, without examining the complainant or his witnesses, directed the Sub-Deputy Magistrate to give his opinion upon the case after hearing the witnesses. This the Deputy Magistrate did, and he wrote a memorandum, which, after noticing certain discrepancies in the evidence of the prisoner's witnesses, concluded in these words: "I do not think that the charge of theft was true." After this opinion had been returned to the Magistrate, the Police sent to him their report of the case, dated the 26th of October. This they submitted in the form C which indicates not that in their opinion the charge was false, but that they had not found any sufficient evidence which would

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justify them in sending up for trial the parties charged. The reason for the Police making their Report in this form sufficiently appears on the face of the report. On the 9th of November the Magistrate, without proceeding further with the petitioner's complaint, wrote across the report "show as false," and on the 19th November following, on the application of Nusibun Nissa, sanctioned the prosecution of the petitioner, for giving false information to the Police under section 182 of the Penal Code, and for laying a false charge under section 211. A prosecution was accordingly instituted before the Deputy Magistrate, who, on the 8th January, discharged the petitioner under section 215, mainly on the ground that the sanction was invalid. The matter was referred to the High Court, and on the 3rd April the Magistrate was directed by this Court (see *ante* p. 413,) to proceed with the trial, and the petitioner, as we are informed, was convicted on the 22nd May. Whilst the prosecution was pending, and on the 22nd April, the petitioner applied to the Magistrate to proceed with his complaint and deal with it according to law. The petitioner was told by the Magistrate to come the next day, which he did, and was then informed that his complaint had been dismissed. The order of dismissal is dated the 23rd of April, and is in these words: "Dismissed in accordance with my decision recorded in the Police Report under section 147 of the Criminal Procedure Code." The decision alluded to by the Magistrate as recorded in the Police Report consists of the words which he wrote across the Police Reports, "shew as false."

It is objected here that this complaint has not been properly dismissed under section 147, inasmuch as it was dismissed without examining the petitioner, and we think that that objection is well founded. Section 147 is explicit that the Magistrate must examine the complainant before dismissing his complaint, and the reason is plain and founded on a maxim of common justice, namely, a Magistrate should not form a judgment adverse to the complainant, or his case, without first hearing what he has to say. It is not easy to understand how the Magistrate could have been under the impression that what he wrote across the Police Report was a dismissal of the petitioner's complaint under section 147.

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At the utmost it amounted only to a direction or order to the Police. Furthermore, the High Court, on the 3rd of April, in its judgment on the application that was made to cancel the order made by the Deputy Magistrate under section 215, expressly mentions that "show as false" could not be treated as a dismissal under section 147. Here the Magistrate was in possession of the complaint, and he could only legitimately dispose of it either by himself, pursuing the procedure pointed out by that section, or by transferring the complaint to some Subordinate Magistrate to dispose of it according to law, neither of which courses he has adopted. The reference to the Deputy Magistrate for his opinion, and the opinion of the officer that the charge was not true, did not discharge the Magistrate from examining the petitioner. Under these circumstances we must make this Rule absolute, and set aside the order of the Magistrate of the 23rd of April 1879.

The petitioner in his petition also asked that the order sanctioning his prosecution should be set aside; but he did not insist upon that part of his prayer before us, and very properly so. Having regard to the judgment and order of the High Court of the 3rd of April, directing the Magistrate to try the accused, the proper time for the petitioner to raise that objection is, if and when he takes proceedings to test the validity of his conviction.

I cannot conclude this judgment without observing upon the extreme inconvenience and prejudice which the petitioner has suffered by the mode in which his complaint before the Magistrate was dealt with; judging from the petitioner's case, as it appears upon the Police Report of the 26th of November, it was one in which the examination of the petitioner was peculiarly necessary before coming to the conclusion that there was no sufficient ground for proceeding with his complaint to use the language of section 147, and *à fortiori*, before coming to the conclusion that it was false. Four times, if not oftener, the petitioner attended before the Magistrate to support his complaint, and once he came with his witnesses in pursuance of the order of the Magistrate, and ultimately without ever having been examined by the Magistrate and without any legal dismissal of his complaint was put upon trial for making the complaint.

[CIVIL APPELLATE JURISDICTION.]

1879 *May 6th.*

No. 277 of 1876.

JOY KISHORE CHOWDHRY AND OTHERS . . . . . } (PLAINTIFFS) APPELLANTS;

AND

PANCHOO BABOO AND OTHERS . (DEFENDANTS) RESPONDENTS.

Hindu Law—Adoption—Sapindas—Inheritance Ex parte Maternâ.

A, who had a son, B, by his wife C, during the lifetime of his son executed an *unoomuttee puttro* in favour of C, empowering her to adopt a son in the event of the death of B. B, on coming of age, succeeded to the ancestral and other estate of his father who had died. Subsequently B died childless, and his widow succeeded as heir to her deceased husband. C afterwards exercised the power of adoption from her husband and adopted D.

Held, that although has heir to A, D could not displace the widow and full heir of B, and that although as heir to B he came after B's widow and mother, D might succeed when on their deaths he united in himself the capacities of heir to A and heir to B.

The rights of an adopted son, unless contracted by express texts, are in every respect similar to those of a natural born son.

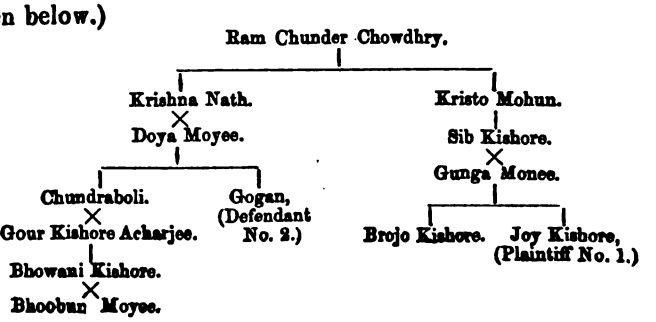
An adopted son takes by inheritance from the relatives, on the maternal side, of his adoptive father in the same manner as a son begotten would take.

There is no difference as regards sapinda relationship between the adopted and the natural born son.

REGULAR APPEAL from a decision passed by the Second Subordinate Judge of Mymensingh, dated the 10th of August 1876.

The facts necessary to be stated in this case are as follows:—

The property claimed in this suit was admitted to have been held and owned at one time by Gour Kishore, father of Bhowani Kishore, and husband of Chundraboli (see the genealogical tree given below.)



On the death of Gour Kishore it devolved upon his son Bhowani Kishore by the Hindu law of succession. On the death of Bhowani Kishore, without issue, a contest arose in respect of it between Chundraboli and her alleged adopted son, Ram Kishore, on the one hand, and Bhoobun Moyee, widow of Bhowani Kishore, and his alleged adopted son Rajendro Kishore on the other. It was alleged by Chundraboli that under an *unoomuttee puttro* granted by her husband, she adopted Ram Kishore after the death of Bhowani Kishore. Ram Kishore was originally the defendant No. 1 in the present suit, and had died since its institution. He was represented in this appeal by his minor son, Juggut Kishore.

On that occasion Bhoobun Moyee, the widow of Bhowani Kishore, similarly set up an *unoomuttee puttro* from her husband, and put forward the claim of Rajendro Kishore, who was alleged to have been adopted by her in pursuance of the aforesaid authority.

This contest was finally settled by the decision of the Judicial Committee, reported in 10 Moore's I. A., 279. One of the questions raised in this appeal was, whether or not their Lordships of the Judicial Committee finally decided that the adoption of Ram Kishore by Chundraboli was invalid *for all purposes*. It was not disputed by any party that the Judicial Committee found that Bhoobun Moyee's alleged authority to adopt was not established, and that consequently Rajendro Kishore's adoption was not valid. As regards the property in dispute, Bhoobun Moyee, as the next heir of her husband, Bhowani Kishore, was held to be entitled to succeed in preference to Chundraboli or Ram Kishore.

A few years after this decision Bhoobun Moyee died, and there was no dispute between the parties that the estate then devolved upon Chundraboli, the mother of Bhowani Kishore.

Chundraboli, after the property had thus become vested in her, executed a document by which she made it over in her lifetime to her adopted son, Ram Kishore. Gogan Chunder, the defendant No. 2, was a consenting party to this arrangement. After thus making over the disputed property to Ram Kishore, Chundraboli died on the 21st Bysack 1277, April 1870.

It was alleged that on her death the estate devolved

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on the next heirs-at-law, viz., the plaintiff No. 1, Joy Kishore, and his brother, Brojo Kishore, since deceased. It will be seen from the genealogical tree given above that Joy Kishore and Brojo Kishore were the grandsons of Kristo Mohun, who was the brother of Bhowani Kishore's maternal grandfather, whereas Gogan, defendant No. 2, was the son (whether natural born or adopted was one of the questions raised in this suit) of Krishna Nath, the maternal grandfather of Bhowani Kishore.

The plaintiffs in this suit, viz., the aforesaid Joy Kishore and Hurro Soondery Dabea, who was alleged to have purchased a share of the disputed property from the former since Chundraboli's death, further alleged that Gunga Monee, the mother of Brojo Kishore and Joy Kishore, who inherited Brojo Kishore's share, made it over to her other surviving son, viz., plaintiff No. 1, by a deed dated 24th Assar 1281, June 1874. The present suit was brought by Joy Kishore and Hurro Soondery against Ram Kishore and Gogan on the 11th July 1874. Against the apparent preferential right of Gogan, the defendant No. 2, the plaintiffs alleged, among other things, that he was the natural born son of Kristo Mohun, but was adopted by his uncle Krishna Nath, maternal grandfather of Bhowani Kishore. Their contention was, that, as an adopted son, he was neither entitled to succeed to the relatives of his natural father, nor to such relatives of his adoptive father as were sprung from a different *Gotra*, or family.

Both the defendants, viz., Ram Kishore and Gogan, alleged that he, Gogan, is the natural born son of Krishna Nath. They further asserted that this was not a *bonâ fide* suit for the assertion of a disputed right, but that, with a view to harass and annoy them, it had been caused to be instituted by the sons of Hurro Soondery, the plaintiff No. 2, between whom and the defendant Ram Kishore, there existed bitter enmity, and that this being the real nature of the suit, it ought to be dismissed as opposed to public policy. As regards Hurro Soondery, the plaintiff No. 2, they objected that she was a mere *benamidar* for her sons. They further contended that the Judicial Committee, in the decision already referred to, upheld the adoption of Ram Kishore as valid, but negatived his right to immediate possession of the property, then in dispute, on the ground that Chundraboli, by adopting him, could not divest Bhoobun

Moyee of the estate which had vested in her on the death of her husband. Lastly, they joined issue with the plaintiffs on the question of Hindu law, referred to above, and maintained that, admitting all the facts stated in the plaint to be correct, the suit should still be dismissed on the ground that Gogan's title to be considered heir of Bhowani Kishore was preferential to that of Joy Kishore, plaintiff No. 1, and his brother.

The Advocate-General (*Paul*), the Standing Counsel (*J. D. Bell*), Baboos *Kally Mohun Dass*, *Mohiny Mohun Roy*, *Rash Behary Ghose*, *Golap Chunder Sircar*, and *Greesh Chunder Chowdhry*, for Appellants.

Woodroffe and *Evans*, Baboos *Unnoda Pershad Banerjee*, *Hem Chunder Banerjee*, *Sree Nath Dass*, *Kishen Comul Bhuttacharjee* and *Jogesh Chunder Roy*, for Respondents.

Paul (*Advocate-General*).—The adoption of Ram Kishore was invalid. It was so held in the case of *Bhoobun Moyee Dabea* vs. *Ram Kishore Acharjee*, 10 M. I. A., 279.

That was an absolute decision as to the adoption, and the reasons given afterwards cannot cut down the conclusion, although the case of *Ram Soondur Singh* vs. *Surbanee Dossee*, 22 W. R., 121, may be relied on by the other side, as cutting down the Privy Council decision.

If the case had been that Ram Kishore being still a youth, and capable of adoption, was adopted after Bhoobun Moyee's death, it might have been different.

For an adoption to be valid, it is necessary that the adopted son should take the estate. The respondents must contend that the adoption of Ram Kishore was valid for all purposes other than the taking of the property out of the hands of Bhoobun Moyee—a contention unwarranted by the decision of the Privy Council. The observations (at p. 86 bottom) of JACKSON, *J.*, in *Gooroo Prosunno Singh* vs. *Nil Madhub Singh*, 21 W. R., 84, are not against me.

[MITTER, *J.*—May not a Hindu adopt a son by will, and by the same will devise or bequeath all his property by the will?]

Paul.—Such a case could never arise.

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[JACKSON, *J.*—But suppose there was no absolute alienation of the property, but that the son to be adopted was left Rs. 100 per mensem and the person adopted was one of three sons?]

Paul.—There the same difficulty would arise.

According to the Dayabhaga the nearest heir is he who is able to confer the greatest amount of spiritual benefit on the soul of the deceased proprietor. "It is by wealth," the author says in verse 13 of section VI, Chap. XI, "that a person becomes a giver of oblations." The estate, therefore, and the offering of the oblations must go together—*Gooroo Gobind Shaha* vs. *Anund Lall Ghose*, 13 W. R., F. B., 49; see pp. 57-8.

The power of adoption might have been exercised by the widow when she came into the estate, but when after the vesting of the property in Bhowani Kishore, there was a mere possibility of the estate coming to her she could not exercise the power. See *Rajah Vellanki Venkata Krishna Row* vs. *Venkata Rama Lakshmi Narsayya*, L. R., 4 In. App., 1; see p. 9; *Bykant Monee Roy* vs. *Kisto Soonderee Roy*, 7 W. R., 392.

Then Menu says:—"A given son must never claim the family estate of his natural father, Ch. IX, para. 142.

J. D. Bell followed on same side.

Woodroffe (for Ram Kishore.)—The validity of the adoption of Ram Kishore is impugned simply upon two grounds: first, that the decision of the Judicial Committee in the suit brought by Ram Kishore Acharjee Chowdhry against Bhoobun Moyee Dabea operates as a bar to the maintenance of this suit, under section 2 of Act VIII of 1859; second, that the decision on the question of the adoption, if not *res judicata*, establishes as a proposition of law, that an authority to adopt granted to a widow by her deceased husband cannot be exercised where the son to be adopted cannot immediately, upon the adoption, take the estate of the person, to whom he is to be taken as an adopted son. Assuming, however, for the sake of argument, that the Privy Council did in the former case decide that Ram Kishore Acharjee Chowdhry's adoption was invalid for all purposes, it is submitted that such a decision would not bar the maintenance of this suit. The question in that suit was whether Ram Kishore, as the adopted son of Gour Kishore

could divest Bhoobun Moyee of the state of which she became possessed as Bhowani Kishore's widow. The question in this suit is whether Ram Kishore was, on the death of Chundraboli, by virtue of his adoption to Gour Kishore, the next heir to the estate of Bhowani Kishore. It is submitted that the same point was not in issue, and that the judgment can only be considered final for its proper purpose and object—*Barrs* vs. *Jackson*, 1 Y. and C., 585; and *Tekait Doorga Persad Singh* vs. *Tekaitni Doorga Koonwari*, 3 C. L. R., 31. In truth, however, the decision relied on did not decide that Ram Kishore's adoption was wholly invalid, and did not lay down any such proposition of law as has been sought to be deduced from it. On reference to the arguments addressed to their Lordships, and on examination of the reasons adduced by Lord KINGSDOWN, it is apparent that in using the expression "we are of opinion that at the time when Chundraboli proposed to exercise it, the power was incapable of execution," their Lordships intended only to hold that Chundraboli was, in the events which had happened, incapable of exercising the powers given to her so as to deprive Bhowani Kishore's widow of the rights in his estate to which she had become entitled on her husband's death. To hold otherwise would be to assume, that the Judicial Committee entered upon an unnecessary disquisition, and decided more than was absolutely necessary for the purposes of the appeal. In support of this construction of the Privy Council decision, the following cases may be referred to—*Bykaunt Money Roy* vs. *Kisto Soonderee Roy*, 7 W. R., 392; *Ram Soondur Singh* vs. *Surbanee Dasi*, 22 W. R., p. 121; *Rajah Vellanki Venkata Row* vs. *Venkata Rama Lakshmi Narsayya*, L. R., 4 I. A., p. 9; *Gooroo Prosunno Singh* vs. *Nil Madhub Sing*, 21 W. R., 85.

The proposition of law contended for by the appellants derives no support from Lord KINGSDOWN'S judgment, and is opposed to Hindu Law. If it were necessary that the person adopted should on adoption take the adoptive father's estate, no adoption could be effected in Bengal by a man during his own life, and no blind man or other person excluded from inheritance could adopt. On the other hand, the Dattaka Chandrika, sec. 6, para. 1, establishes that such persons may adopt. The Dattaka Chandrika,

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sec. 1, para. 15, shows that an adoption of persons unequal in class (a practice not now permitted) created a perfectly valid filial relationship, although such sons had no heritable right. In truth, the right of adoption is not dependent on such considerations. It is a right recognized by law as existing *per se* and, when validly exercised, creates definite rights, though not necessary rights of property. [Upon this point the following cases were cited—*Kally Prosonno Ghose* vs. *Gocool Chunder Mitter*, I. L. R., 2 Cal., 295: and *Kalova Kom Bhujangrav* vs. *Palapa Valad Bhujangrav*, I. L. R., 1 Bom., 248.]

With reference to the cross objections it was submitted that the suit was not maintainable as being contrary to public policy, or if maintainable, was so only as to the specific share claimed by the plaintiff No. 1. The following cases were relied on—*Chedambara Chetty* vs. *Renja Krishna Muthu Punchaiya*, 13 B. L. R., 509; *Ram Coomar Coondoo* vs. *Chunder Canto Mookerjee*, I. L. R., 2 Cal., 233—to show that the Court of First Instance was in error in finding that Gogan Chunder Chowdhry had been adopted by Doya Moyee with the permission of Krishna Nath, and that the documents upon which the Subordinate Judge relied were inadmissible in evidence and had not in fact been proved or put in evidence.

The lower Court found that Gogan was the natural son of Kristo Mohun, and that he was adopted by Krishna Nath. Now, we say that the Court below should have come to the conclusion on the evidence that Gogan was the natural son of Krishna Nath. If he is, we must succeed. If he is the son of Kristo Mohun, we are also entitled to succeed, unless the other side show that he was not adopted into the family of Krishna Nath.

In this way the question arises as to the right of an adopted son to succeed collaterally.

Assuming that Gogan is the adopted son of Krishna Nath, I shall contend that he was entitled to succeed to the whole of the property lineally and collaterally, on the ground of spiritual benefit.

Now as to this point Menu says: "Of the 12 sons of men six are kinsmen and heirs; six not heirs, *except to their own fathers*, but kinsmen,—Chapter IX, sloke 158. The clause in

italics is Kulluka Bhatta's gloss. The words actually used are *bandhu* and *dayada*.—(*See* Sloke 159; and 2 Colebrooke's Digest, Madras Ed., Book V., Ch. IV, section 1.)

[JACKSON, *J.*—Menu only says these six had certain privileges.]

The words used are *gotra dayada*, and should not be read as restricting the inheritance to *shugotra dayada*, still less as containing any prohibition to extend it to *ashugotra dayadas*.

In the Dattaka Mimansa, section II, sloke 5, *gotra* is used to mean race or lineage, but limited to persons of the same family; and in the Dattaka Chandrika, sec. V, para. 22, dealing with the same passage, the words used are *bandhu, dayada, i.e.*, heirs to kinsmen. Now *bandhu* means ordinarily those who are not of the same *Gotra*—Cf. Menu, Chap. IX, sloke 110—and the word which applies exclusively to agnates (*gonta*), while it might have been, has not been used. All that Menu says, therefore, is that the *dattaka* and *aurasa* sons are *bandhu* and *dayada, i.e.*, takers of the inheritance, and no limitation is put on either.

Now it cannot be doubted that the adopted son is a *sapinda*, for sapindas are either *gotra* or *ashugotra*. See Dattaka Mimansa, section VI, slokes 32 and 39; and Dattaka Chandrika, section III, para. 18.

In para. 1 of section III of the Dattaka Chandrika the author points out that a real son born after the adoption of another takes precedence. "Otherwise," he says, "the adopted son in every respect resembles the real legitimate son." [See para. 24 of the same section; and also Sutherland's Synopsis (Stoke's Hindu Law Bks.) p. 668—which is in favour of my view. Strange's Hindu Law, Vol. I, p. 97 (Ed. of 1830) where it is said that the right of succession to the adopter in case of a *dattaka* son "operates lineally and collaterally." Compare Sutherland's note on this statement at p. 116 of Vol. II of Strange's Hindu Law. The passage in the Mitakshara referred to in that note will be found in Chap. I, section 11, paras. 30, 31 and 32. See also *Sumboo Chunder Chowdhry* vs. *Naraini Dibeh*, 3 Knapp, 55, and the *Tagore* case, 9 B. L. R., p. 397.]

Mr. Macnaghten assumed—Vol. I, 78, that, as regards cognates, the point was decided by a Sudder decision—*Gunga Mya* vs.

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Kishen Kishore Chowdhry, 3 Select Rep., 128, but that was not so; for looking at that decision we find that Court expressly abstained from deciding the point. (But see Vol. II, p. 8, case VII.)

In the Vyavastha-Darpana, p. 765, the author says that the adopted son "not only inherits the estate of his adoptive father, but likewise lineally and collaterally the estates of the near and distant kinsmen of that person. He likewise represents the real legitimate son in relation to his adoptive mother and her ancestors, become his maternal grandsires."

At p. 956 of his Vyavastha-Darpana, Baboo Shama Churn Sircar, however, says that according to the Dattaka Chandrika a *dattaka* son, not endued with good qualities, is entitled to inherit only from his father and not from a *bandhu*; but this is not what the Dattaka Chandrika says. He goes on to say that the doctrine of Jimuta Vahana is almost the same.

Now the exact position of adopted sons is not dealt with by Jimuta Vahana—(See *Lokenath Roy* vs. *Shamasoonduree*, S. D. A., 1858, p. 1863.) Having previously dealt in paras. 5 and 6 with partition between the sons themselves, in para. 7, Jimuta Vahana considers the question of partition between other classes of subsidiary sons, and *aurasa* sons. The son of the wife being second, according to Menu, he says in para. 7:—"In a partition *among sons of the wife and the rest* with a true legitimate son, such of them as are of the same class with the father, and superior by tribe to the true son, whether they be sons of an appointed daughter, or issue of the wife, or offspring of an unmarried daughter, or secretly produced, or abandoned, or received with a bride, or born of a twice married woman, or given, or self-given, or made, or bought, shall be entitled to a third part of the share of a true son." The author, I contend, in making this enumeration, the order of which is not borne out by any other authority, had not before his mind any question of the order in respect of right to inheritance of the sons.

[MITTER, *J.*—Is it not in accordance with the order given by Devala?]

Woodroffe.—No. We have no original text of Devala. That that order is according to Devala, is a mere assumption, which is made by Shama Churn Sircar, and is negatived by Strange and by the Privy Council.

Now para. 7, just quoted, goes on to quote from Devala, who says: "These 12 sons have been propounded for the purpose of offspring, being (1) begotten by a man himself; or (2) procreated by another man; or (3) received; or (4) voluntarily given." This, then, is the order given by Devala, the last being the self-given son.

Now, according to Sri Krishna, "issue begotten by a man himself" comprises, 1*st*, the *aurasa* or true legitimate son; 2*nd*, the *paunarbhava* or son by a twice married woman; 3*rd*, the *puttrika* or appointed daughter. "Issue procreated by another man" intends the kshetraya or son of wife, and so forth. "Sons received" are, 1*st*, the *dattaka*; 2*nd*, *crita*; 3*rd*, *sahbdha*, the son of a pregnant bride; 4*th*, *canina*, a son of an unmarried damsel; and 5*th*, *crittrima*, a son made. "Voluntarily given," signifies, 1*st*, *appavedda* or son rejected; 2*nd*, *swayamapagata*, one who comes of his own accord and 3*rd*, *gudhotpana*, a son secretly produced. Sri Krishna's gloss, therefore, runs thus: "*Begotten by the man himself*," aurasa, paunarbhava, puttrika; "*procreated by another man*," kshetraya; "*received*," dattaka, krita, sahbdha, canina, critima; "*voluntarily given*," appavedda, swayamapagata, gudhotpana.

The translator has, through mistake, treated "*parashava*," the son of a priest by a woman of the servile class, as the 3*rd* of the sons begotten by the man himself, and added "adi," (and so forth,) which does not exist in the original. Thus we have the dattaka son *fifth* in order. (See also Stoke's Hindu Law Books, p. 300 note; the Dayabhaga, Colebrooke's edition, p. 154; Prosunno Coomar Tagore's edition of Sri Krishna's Commentary, p. 244, in Sanscrit.)

[MITTER, *J.*—How do you make the dattaka son fifth? Sons of the wife and *so forth* come fourth.]

Woodroffe.—There is no "and so forth" in the original. The words are "*puraji kshetraya.*" The text ought to be read thus, "*puraji, i.e., kshetraya.*" The original text of Sri Krishna supports my contention.

If the Dayabhaga meant to say that an adopted son could not take the property of his grandfather, but only his father's property, then the author is in direct conflict with the decision of this Court in *Gourbullubh's* case, that an adopted son is entitled to

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take the estate of his grandfather. As to the authority of the case of *Gunga Mya*, 3 Select Rep., 128 (170), the following authorities were quoted:—Mayne's Hindu Law and Usage, pp. 138, 140 and 141; *Gunga Persad Roy* vs. *Brijessuree Chowdhrain*, S. D. A., 1859, p. 1,091; *Morun Moee Debeah* vs. *Bejoy Kishto*, W. R., Sp. No. 121; Dattaka Mimansa, section VI, para. 50; Dattaka Chandrika, section III, paras. 16 and 17; Digest Vol. II, p. 405, *et seq.*, Mad. Edition; *Teencowree Chatterjee* vs. *Dinonath Banerjee*, 3 W. R., 49; *Sham Kuar* vs. *Gaya Din*, I. L. R., 1 All., 255.

In the Dayabhaga, Ch. XI, section VI, para. 12, *et seq.*, Jimuta Vahana deals with cases of distant succession. After pointing out that the succession of the widow takes effect under express texts, in para. 12, he lays down that on failure of the paternal line the property shall devolve on the maternal uncle, and in para. 13 he gives the reason, viz., the spiritual benefit accruing to the deceased. "Accordingly," Jimuta Vahana says (para. 14): "Menu proceeds thus: Then in failure of such kindred (that is on the mother's side) the distant kinsmen shall be the heir, or the spiritual preceptor or the pupil."

The whole is then summed up in paras. 20 and 21.

As I understand the last para., the right of the maternal uncle and others there mentioned depends on their offering three libations.

Now it seems to me that Bhowani Kishore could only succeed to the property of Krishna Nath, not to the property of Ram Chunder, that is to say, there is no text which lays down that the son's daughter is entitled to succeed.

They can only get rid of this on the ground of spiritual benefits. Now, the only person to whom Bhowani Kishore can offer oblations is Ram Chunder. Gogan offers—1st, to Krishna Nath, 2nd, to Ram Chunder, 3rd, to Ram Chunder's father, and his son would offer to Gogan, Krishna Nath and Ram Chunder, so that unless on the theory of spiritual benefit they cannot succeed.

Ex concessis when the former suit was instituted Gogan claimed to be, and was described in the lower Court as the uterine brother of Chundraboli Debia. Now it has been attempted to be shown that he was the son of Kristo Mohun and adopted by

Krishna Nath. As to this adoption the evidence is not sufficient. (Counsel then examined the evidence, contending that it was insufficient).

Evans (for Ram Kishore and Gogan.)

As to the Privy Council decision in 10 Moore, the Court is asked to believe that in a case upon the right to perform *pinds* arising between Ram Kishore and another, the Privy Council decided whether Chandraboli could, or could not, adopt. It would have been different had the case been:—Whether Chundraboli could adopt a son who would offer *pinds*.

In the Bombay case (I. L. R., 1 Bom., 248) cited by Mr. Woodroffe, the estate had vested in adverse possession.

That the question of adoption is utterly distinct from that of inheritance is shown by the case of blind and impotent men.

I contend here that if the adoption was sufficient to enable the adopted son to offer *pinds*, then he is entitled to succeed collaterally in this case.

As to Gogan Moyee's right, *Morun Moee Debeah's* case, relied on by the other side, does not decide the question. Gogan does not claim, through Doya Moyee, to succeed to the members of her family.

It must be admitted that Krishna Nath would have inherited from Chundraboli's natural son, Bhowani Kishore, but *Gunga Persaud's* case goes further than this.

[MITTER, *J.*—The only point *Morun Moee's* case decides is, that an adopted son does not succeed to the property of his maternal relatives. The case here is, that Gogan is said not to be capable of inheriting from his paternal relations.]

That case, even if rightly decided—which I submit it was not,—is not binding on this Court.

There is no text which says that an adopted son cannot inherit from a person not of his *gotra*.

Morun Moee's case may be further tested by supposing that Gogan having had an adopted son, had a daughter who marries and has a son; for could it then be said that Gogan would not inherit from his own daughter's son, or that his daughter's son could not inherit from him?

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As to the question of inheritance *ex parte maternâ*, it should be noticed that Menu says nothing about it. The Dayabhaga explains it inferentially only.

The question was not originally raised. The question was: Is the adopted son entitled to property of collaterals *ex parte paternâ?*

It has now been definitely settled that an adopted son does succeed to collaterals, and among heirs is in the first class. The authority of Menu, (see Chap. IX, sections 181-7,) and of the Dayabhaga establishes the right of sapindas.

[MITTER, *J.*—Gogan comes within the text, because he is a sapinda.]

Kulluka Bhatta's gloss cannot be read restrictively; otherwise a man could not offer pinds to his maternal ancestors.

In the Dayabhaga, Chap. I, verses 2 and 3, paternal inheritance is treated generally as including succession to the property of all relations, so that the literal meaning of paternal is not necessarily to be adhered to.

I now turn to Dayabhaga, Chap. XI, section 6, in order to show where and why the succession to paternal inheritance is laid down. Para. 12, after dealing with succession on failure of the paternal line, adds: "Menu has indicated it only by a passage declaratory of succession according to the nearness of the oblation." Thus, succession *ex parte maternâ* must be taken to depend on the nearness of oblation.

After explaining in para. 14 that after the kindred on the mother's side the distant kinsman is heir, he proceeds to his conclusion in verses 16, 17. (See and compare these sections in the Dayabhaga.)

J. D. Bell, in reply.—The decision in 10 Moore was an absolute decision that the appointment of Chundraboli was void to all intents and purposes. It is impossible to hold that an adoption can be good for the purpose of spiritual benefit, while it is invalid for the purpose of taking the estate. Lord KINGSDOWN, after pointing out that the deed of adoption does not assign any limits to the period within which the adoption may be made, says:—

"It is plain that some limits must be assigned. It could

hardly have been intended that after the lapse of several successive heirs a son should be adopted to the great-grandfather of the last taker when all the spiritual purposes of a son, according to the largest construction of them, would have been satisfied.

Here Lord KINGSDOWN had in view the passage in the Dattaka Mimansa, section 1, para 13.

[JACKSON, *J.*—You ask us to hold that Gour Kishore having made provision for that condition of spiritual happiness set out in the Dattaka Mimansa, sec. I, para. 13, is to be deprived of that benefit because the enjoyment of the property by Bhowani Kishore's widow made the valid execution of the power of adoption impossible.]

Bell.—But the Privy Council held that there was no valid adoption.

[JACKSON, *J.*—What tests do you apply in order to see whether the adoption was valid.]

Bell.—I contend the adopted son must be in the position of heir to his deceased adoptive father, and able to perform all the necessary services for his father and deceased brothers.

I further contend the matter is *res judicata*. (See *Gobind Chunder Koondoo* vs. *Taruck Chunder Bose*, I. L. R., 3 Cal., 145; *Krishna Behari Roy* vs. *Bunwari Lall Roy*, I. L. R., 1 Cal., 144; *Khugowlee Singh* vs. *Hossein Bux Khan*, 7 B. L. R., 673.)

The case of *Barrs* vs. *Jackson*, 1 Y. and C., 585, on which the other side rely, is reported on appeal 1 in Phillips, 582, and there the whole principle of the lower Court's decision is upset.

[On the question of Champerty the following cases were referred to:—*Ram Coomar Coondoo* vs. *Chunder Canto Mookerjee*, I. L. R., 2 Cal., 233, and *Chedambara Chetty* vs. *Renja Krishna Muthu Vira Naiker*, 13 B. L. R., 509, Counsel contending that the facts showed that the case was *bonâ fide* instituted, and was, therefore, not within the meaning of the cases on public policy.]

Mohiny Mohun Roy.—The question of Hindu Law must be decided with reference to Hindu Law alone. The highest authority is the Dayabhaga. In Chapter X, paragraphs 7 and 8, it appears that the enumeration there given is that of Devala.

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[MITTER, *J.*—If para. 8 has been construed in a particular way by the Privy Council in the case of *Sumboo Chunder Chowdhry* vs. *Naraini Dibeh*, 3 Knapp's Rep., 55, can we now re-open it?

The question in that case was whether one adopted brother could succeed to another adopted brother. Now if your contention is right the Dayabhaga is opposed to that case.]

At most the judgment in that case does not say that the adopted son can be an heir to kinsmen.

[MITTER, *J.*—You must take it as Hindu Law that an adopted son can succeed collaterally.]

Mohiny Mohun Roy.—I shall endeavour to show that an adopted son, if he can succeed collaterally, can only succeed in the *gotra* of his father. See Menu, Ch. IX., verses 158, 159 and 160, from which it appears that of the 12 sons whom Menu has named, six are kinsmen and heirs, while six are kinsmen only and not heirs. The next text is explained by Kulluka Bhatta as showing that only natural sons are meant as heirs.

[MITTER, *J.*—Except in the case of Kulluka Bhatta you cannot find the words *gotra, dayada, i.e.*, heirs of the family. Now Gogan was an heir of the family.]

The words are "in the gotra." He cannot take out of his "gotra," see Dattaka Chandrika, sec. 6, para. 1.

[MITTER, *J.*—If that text excludes the adopted son it also excludes the natural son.]

A daughter who is barren cannot succeed—Dayabhaga, Chap. XI, section 2, para. 3, the theory being that a daughter inherits only because she may bear a male child, yet a barren daughter might adopt. Therefore it must be taken that mere adoption gives no claim. The texts are against an adopted son succeeding at all. See remarks of PUNDIT, *J.*, in *Morun Moee Debeah's* case, W. R. Sp. No. p. 124; and *Chinnarama Kristna Ayyar* vs. *Minachi Ammal*, 7 Mad. H. C. R., 245.

[JACKSON, *J.*—The Privy Council having held that an adopted son can succeed collaterally, you must show that he can only succeed *ex parte paterna.*]

It lies, I contend, on the other side to show that the doctrine of the Privy Council may be extended to succession *ex parte materna*

The case referred to in 7 Mad. H. C. Reports shows that an adopted son cannot succeed *ex parte maternâ*.

[JACKSON, *J.*—It is one thing to say that an adopted son may not succeed collaterally to his mother's relatives and another to say that he cannot succeed through his mother as heir to his father's relations.]

In the Mitakshara, Chap. I, section XI, *verse* 31, "Sapinda" is used in a restricted sense conveying the idea of belonging to the *gotra* of the father.

[JACKSON, *J.*—You are endeavouring to contract the operation of the general law. In the Dattaka Chandrika, section V, verse 28, it is said: "The son of the wife, the son given, and the rest receive the share prescribed for them by the general law; for the grounds for contracting the operation of the same are wanting."]

Mohiny Mohun Roy.—In section V, verse 3, the author of the Dattaka Chandrika, referring to the second class of six sons, in which he includes the son given, says "these six, whose filial relation proceeds from an overt act of acceptance, are kinsmen but not heirs." [Cf. verses 15 (where the text of Devala is referred to) 22 and 24.]

If we follow the text of Devala it is clear the adopted son can only succeed to his father. Succession in the Dattaka Chandrika is limited to sapinda kinsmen.

[MITTER, *J.*—There are three degrees of Sapindas in the family of the adopter "through the connexion by the funeral cake," Dattaka Chandrika, section III, para. 18, and these can succeed through the pinda though not heirs, see paras. 16 and 17.]

The real meaning of Sapinda is given in the Dayabhaga, Chap. XI, section I, para. 38, as the natural member of the same family. In para. 39 the meaning is extended to include the maternal relatives, but this is only for a special purpose, see Daya Krama Sanghraha, Chap. I, section 10, para 8, and Dayatattwa, Chap XI., paras. 6, 7 and 8, where the same meaning is attached.

Woodroffe replied on the question of the factum of the adoption of Gogan.

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The following judgments were delivered by the Court (1) :—

MITTER, *J.* (after stating the facts proceeded as follows) :—

This question of Hindu law has been decided by the lower Court in the plaintiffs' favor, although its ultimate decision has been against them.

The defendants, respondents, have again raised it before us, and as it goes to the very foundation of the plaintiffs' rights, we shall deal with it first.

The lower Court has decided this question in favor of the plaintiffs, solely on the authority of a gloss on a text of Menu by Kulluka Bhatta, the well-known commentator on the Institutes of Menu. The text of Menu and the gloss in question are to be found at pp. 145 and 146 of Colebrook's Digest, vol. III, book V., chap. IV., section 1. Whether this gloss supports the conclusion of the lower Court is a question to which I shall revert hereafter. But it is beyond all doubt that it would not be a correct basis of decision, if the position laid down in it be found to be opposed to the authorities which are generally appealed to, and which govern the decision of questions of adoption arising in the Bengal School. These are the two well-known works on adoption, viz., the Dattaka Chandrika by Devandha Bhuttu, and the Dattaka Mimansa by Nundu Pundit.

Then how does the question raised before us stand upon the authority of those two works of adoption? It appears abundantly clear from both these treatises that the position and status of an adopted son are precisely the same as those of a natural born son, except in a few instances which are expressly enumerated. In section 3, para. 1, of the Dattaka Chandrika, the author, after laying down a special rule, viz., that an adopted son cannot "officiate in the sixteen funeral repasts" if the legitimate son exists, says: "And a text of Yajuavalkya recites:—Amongst these the next in order is heir, and presents funeral oblations on failure of the preceding; otherwise the adopted son in every respect resembles the real legitimate son." The same author, in discussing the question whether an adopted son succeeds to empire or not, says in

(1) JACKSON, MITTER, and MCDONELL, *J.J.*

section 5, para. 28: "Thus, the son of the wife, the son given and the rest, receive the share prescribed for them by the general law. For grounds for contracting the operation of the same are wanting," &c. Again in section 6, para. 53, of the Dattaka Mimansa it is laid down: "The adopted son, as substitute for the real legitimate son, being the agent of rights performed by a legitimate son, it follows that he is the performer of funeral repasts, the objects of which are the *manes* in honor of whom a legitimate son performs such repasts. For, *without difference*, relation to the father and other sires of the adopter, obtains in the *same manner as relation to the general family*, the *sakha*, the family deity, and family rules of that person."

From these passages it is evident that the rights of an adopted son, unless curtailed by express texts, are in every respect similar to those of a natural born son.

Have any texts been produced to show that an adopted son cannot succeed to the estate of such relatives of his father as are sprung from a different family? The learned Advocates, who argued this question before us in support of the plaintiffs' contention, have not been able to refer us to any authority to establish this proposition.

On the other hand, both in the Dattaka Chandrika and the Dattaka Mimansa there are passages which lead to the opposite conclusion. The author of the Dattaka Chandrika, after referring to the contradictory texts of ancient *rishis* upon the subject of the adopted son being heir to his father's kinsmen, in section 5, para. 22, says: "By reason of succeeding to the estate of *Sapinda kinsmen*, as well as to that of the father, he is (argued by the one to be) heir to kinsmen." Then, after reconciling in the same paragraph these contradictory passages in a way which it is necessary here to notice, in para. 24, he lays down the law thus: "Therefore, by the same relationship of brother, and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother or *other kinsmen*, when such son may not exist (the adopted son) takes the whole estate even."

Now reading the two passages together, it is clear that the phrase "*other kinsmen*," italicised above, at least includes sapinda kinsmen, if not others. Therefore, we have next to consider the

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question whether the defendant No. 2, Gogan, is a Sapinda kinsman of Bhowani Kishore or not. The following passages from the Dattaka Chandrika and the Dattaka Mimansa will show that, as regards sapinda relationship in the family of the adoptive father, there is no difference between a *dattaka* and a natural born son. Para. 32, section 6, Dattaka Mimansa: "Therefore, not being otherwise inferrible, the relation of 'Sapinda,' in the peculiar family (kula) of the adopter, as founded only on express texts of law, must be admitted. This is declared: Relation of Sapinda is of two descriptions,—through consanguinity, and connection by a funeral oblation. Of these the relation as Sapinda, arising from consanguinity being obviously barred, in the case of the adopted son. Hemadri, (after having declared the relation, as arising alone from connection by a funeral oblation, and consanguinity,) has determined the relation of Sapinda of sons given, and the rest, in the family of the adoptive father, as extending only to the third degree."

Para. 38.—"But in the instance of the real legitimate son, is not thus the performance of the Sapindi-karana (for his father) with three forefathers only, established by holy writ? Being established then by this alone, for what purpose is the inconvenience of introducing another express text(to declare it)? Anticipating this objection, the author subjoins: "Therefore this," of adopted sons, "is a relation of Sapindas extending only to the third degree, being productive of uncleanness and disability of marriage, and consisting in connection by funeral oblations, &c., &c."

Para. 39.—"Intending merely this, it is said by the author of the Sangraha: 'The relation as Sapinda, of adopted sons, extends to three degrees in the family of the natural father, and like that, in the family of the adopter. This is a rule of law.' The mention here of relation as Sapinda, in both families, is with reference to the son of two fathers; for it has been shown, that the ceremony, Sapindi-karana, for such son, is performed with two sets of three forefathers. Of the absolutely adopted son, the relation of Sapinda, in the family of the adopter, consisting in connection by funeral *oblations, extends to three degrees*; in the family of the natural father, arising only from consanguinity,

it extends to seven degrees." To enlarge would be useless. Dattaka Chandrika, section 3, para. 16: "In the same manner, by parity of reason, where there may be a diversity of mothers, the sires of the natural mothers, are first designated by a son, who is son to two fathers, at the funeral repast, (suggested by the passage subjoined in honor of the maternal grand sires, subsequently the sires of her, who is the adoptive mother. Where the paternal sires are honored, there certainly are the maternal."

Para. 17—"But the absolutely adopted son presents oblations to the father, and the other ancestors of his adoptive mother only; for he is capable of performing the funeral rites of that mother only, and thus, in conformity with the spirit of the sentence he is (destined) to continue the line of his ancestors which is subjoined as the reason, (in the text of Vasishtha) the prohibition (therein), 'let not a man give an only son,' refers to an adopted son, other than the *Dwyamushyayana*, or son of both fathers; for (where the adopted son is such), no extinction of lineage ensues, as has already been declared."

Para. 18.—"The relation as Sapinda is next considered. This extends to three degrees; in the family of the natural father, by reason of consanguinity; and in that of the adopter, through connection by the funeral cake.

Para. 50 of section 6 of Dattaka Mimansa:—"The forefathers of the adoptive mother only, are also the maternal grandsires of sons given, and the rest for the rule regarding the paternal, is equally applicable to the maternal grandsires (of adopted sons)."

Para. 51.—"As for what is said by Hemadri, that the precept in joining the performance of a funeral repast in honor of the maternal grandfather, refers to the natural maternal grandfather; that is inaccurate; for, it is at variance with the passage 'of him, who has given away his son, the obsequies fail.' Nor is the capacity of the maternal grandsires, as givers, wanting; for, by reason of their affording their assent to the gift, (as appears from this passage,—having convened his kindred, &c.,) they also are parties to the same. Besides, by this passage, the funeral cake follows the family and estates." The family and estates are declared to be the cause of performing the funeral repast; and the estate of the maternal grandfather also, like that of the father,

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lapses from the son given. His incapacity to perform a funeral repast in honor of his original maternal grandfather, is properly declared."

Para. 52.—"Accordingly Hemadri himself, from not being satisfied with that (just stated), has advanced the other position." In the same manner, as for the "secondary father, a funeral repast must be performed in honor of the secondary maternal grandfather and the rest."

It being thus established that the adopted son succeeds to the *Sapinda* kinsman of his father, and that as regards the relationship of *Sapinda*, there is no difference between the adopted and the natural born son, the question before us is reduced to this: Whether Gogan is a *Sapinda* kinsman of Bhowani Kishore.

A reference to the genealogical tree will show that the three immediate paternal ancestors of Gogan are the three immediate maternal ancestors of Bhowani Kishore. Bhowani Kishore, while living, was bound in Parvana rites to offer funeral cakes to those three maternal ancestors. He now being dead, therefore, participates in the funeral offerings that Gogan on similar occasions makes to the same three ancestors who are his adoptive father, grandfather, and great grandfather. Consequently Gogan and Bhowani Kishore are related to one another as *Sapindas* in accordance with the definition of "*Sapinda*" laid down in the Full Bench Decision, reported in 5 B. L. R., 15—*Guru Gobind Shaha Mandal* vs. *Anand Lall Ghose Mazumdar*. This definition is entirely in accordance with para. 38, Chap. XI, section 1, Dayabhaga, and para. 7, Chap. XI of the Dyatattwa.

The conclusion at which the lower Court has arrived upon this point is, therefore, wholly opposed to the law as laid down in the Dattaka Chandrika, and the Dattaka Mimansa, which are generally accepted as works of unquestionable authority on the subject of adoption.

It has been contended before us that verse 8 of Chapter X of the Dayabhaga supports the conclusion of the lower Court, although it has not expressly referred to it. It is said that the "son given" is not included amongst the first six kinds of sons who are declared to be heirs of kinsmen in that verse. This contention is clearly opposed to the ruling of the Judicial Committee

in *Shumbhoo Chunder Chowdhry* vs. *Naraini Dibeh*, 3 Knapp's Rep., 55. If we are to adopt the construction, we must hold that an adopted son cannot succeed, collaterally, *at all*, a position opposed to the uniform current of decided cases upon the subject. It is true that in some of these cases it has been taken for granted that the text in question of the Dayabhaga bears the construction for which the plaintiff's counsel contends. But a careful examination of the immediately preceding verse, viz., verse 7, will show that that is not the correct construction of verse 8.

The author of the Dayabhaga deduces his conclusion in verse 8 from Devala's text, referred to in verse 7. But it is not correct to say that the Devala's text places the "son given," within the class of sons who are not heirs of kinsmen. Devala's text is not before us, and, it may be that, he, in *reciting* the twelve descriptions of sons, followed the order given in verse 7; because we find that the same text, which is referred to in the Dattaka Chandrika, and the Dattaka Mimansa and Colebrook's Digest, recites them in the same order. But the text after reciting them in that order classifies them thus, viz.: (1) "son begotten by a man himself;" or (2) "pro-created by another;" or (3) "received;" or (4) "voluntarily given." After having classified them in this manner the text goes on to say among *these*, the first six are heirs of kinsmen, &c.

It seems to me to be reasonable to hold that the phrase "first six" here refers to the first six, according to *the classification* immediately preceding, and not the first six according to the *recital* of the different descriptions of sons given in an earlier portion of the text. In a note by Srikrishna Tara Sunkur, the order which the different descriptions of sons occupy, according to the aforesaid classification, is given, and it appears from it that the adopted son falls within the first six. It is evident, therefore, that according to verse 8, the adopted son succeeds lineally as well as collaterally. This is the construction which, as already remarked, was adopted by the Judicial Committee in *Shumbhoo Chunder's* case.

Of the European text writers, there is a consensus of opinion that the adopted son succeeds to the collateral relations of his

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adoptive father. They lay down this rule without any limitation. It is true that in Macnaghten's Hindu Law, p. 78, it is laid down, on the authority of the decision of the Sudder Dewany Adawlut, in the case of *Ganga Mya* vs. *Kishen Kishore Chowdhry*, 3 Sel. Rep., 128, that an adopted son does not succeed to the relatives of the adoptive mother. Whether that position is right or wrong it is not necessary to discuss in this case. Gogan does not lay claim to the property of any of his *maternal relatives*, but to the property of Bhowani Kishore, who is related to him by adoption, *ex parte paternâ*. But upon the point whether the adopted son succeeds to his adoptive *father's* relatives Mr. Macnaghten is at one with all the other European text writers.

The same view of the law is taken by Jagannath in his Digest. After fully discussing this question at pp. 270 to 273 of Vol. III. he comes to the conclusion that the adopted sons are heirs to kinsmen as well as to their own adoptive fathers.

It remains to notice the gloss of Kulluka Bhatta, upon the sole basis of which the decision of the lower Court upon this point rests. As I have already remarked, if it really supported the view of the lower Court, its authority could not preponderate against that of the Dattaka Chandrika and the Dattaka Mimansa; but it seems to me that it does not warrant the conclusion arrived at by the lower Court. The gloss in question, which is to be found in p. 146 of Colebrook's Digest, Vol. III, is to the following effect:—

"Menu sprung from the self-existent Brahmin, and first of the fourteen Menus; among these twelve sons of men whom he has named, the first six are *pronounced kinsmen, and heirs to collaterals, &c.*

In the original the phrase গোত্র দায়দ (*gotra dayada*) stands for "heirs to collaterals." *Dayada* is equivalent to heirs, and *gotra* to family name. It is said that *gotra dayada* means heirs of the persons bearing the same family name. It may be that this would be the meaning of the phrase above alluded to, if the letters are strictly adhered to. But it appears to me from the context, that these words are intended to include all the collateral members of the family who stand in the relation of Sapinda, &c., to the adopted son.

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But granting that the literal construction should be adhered to, does the text in question support the conclusion of the lower Court? It lays down simply that the first six kinds of sons are heirs to the *kinsmen*, sprung from the same family.

It is not necessarily implied thereby that any one of these six descriptions of sons is not entitled to inherit to the estate of a kinsman sprung from a different family. If that were so, the natural born son would also be debarred from inheriting the wealth of such kinsmen.

Now as regards decided cases, it seems to me that the precise point raised before us is not touched by any one of them. The cases of *Morun Moee* vs. *Beejoy Kisto*, W. R., Special No. 121, and *Ram Chinnara Kristna Ayyar* vs. *Minatchi Ammal*, 7 Mad. H. C. R., 245, relate to the right of the adopted son, to succeed to the estate of the relatives of the *adoptive mother*, which is not the question here. In the other cases cited, the question whether the adopted son inherits his adoptive father's relatives *who are sprung from a different family*, did not arise.

For the foregoing reasons, I am of opinion that the contention of the plaintiff upon this point fails, and the decision of the lower Court upon it is erroneous.

JACKSON, J.

JACKSON, J. :—

My brother MCDONELL and myself entirely concur with Mr. Justice MITTER in the conclusion stated in his judgment, and we think, with our learned brother, that according to the true interpretation of the Hindu Law, prevailing in Bengal, an adopted son takes, by inheritance from the relatives on the maternal side, of his father by adoption, in the same manner as a son begotten would take. If this construction of the law is correct, then Gogan, assuming him to have been adopted by Krishna Nath, being indisputably nearer in degree than the plaintiff Joy Kishore and his deceased brother, the plaintiffs would, on that ground alone, be out of Court. Joy Kishore and Brojo Kishore not being in presence of Gogan heirs to the deceased Bhowani Kishore, unless, indeed, Gogan were shown to be incapacitated, and we may at once say that the attempt to show is entirely failed, and has not been repeated before us.

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This, if the matter were certain to rest here, would suffice to dispose of the suit. But as the plaintiffs may be advised to carry the case further, it is our duty to decide also the other questions which arise out of it.

The property in suit, it will be borne in mind, was ancestral property of one branch of the exceedingly prolific family of the Acharjees of Muktagacha. It descended in due course to one Gour Kishore, who was born in one branch, but adopted into another, and from him, devolved on a son, Bhowani Kishore, born of his marriage with Chundraboli.

It is this Bhowani Kishore whom the plaintiffs describe as the last full owner, and from whom directly they make title by inheritance.

Bhowani Kishore, however, having died in the lifetime of his mother, she set up a right to adopt another son, and did adopt one who was called Ram Kishore.

Bhowani Kishore's widow, Bhoobun Moyee, who actually succeeded him, had previously, and it would seem, at first, with the acquiescence of the mother, set up a will containing a permission to adopt and, after some time, made an adoption. The ladies had, at this time, quarrelled, the mother impeached Bhoobun Moyee's document, her husband's pretended will, as a forgery, and the result was a suit on behalf of Ram Kishore against Bhoobun Moyee and her alleged adopted son, which finally went in appeal to Her Majesty in Council, and ended in Bhoobun Moyee's power to adopt being negatived, and in a decision as to the status of Ram Kishore, of which the precise effect, as already mentioned, is one of the questions for our consideration. The case will be found in 10 Moore's Indian Appeal Cases, p. 279, and the judgment of their Lordships was delivered in May 1865.

Bhobun Moyee, having died not very long after, Chundraboli succeeded as mother of Bhowani Kishore, and she almost immediately assigned over all her rights to Ram Kishore by a deed bearing date 26th Bhadro 1276=10th September 1869.

This document was witnessed, in token of assent, by three persons who appear to have been agnates of Bhowani Kishore, and on the 30th December following Gogan executed a separate deed of confirmation, reciting that he had been absent when

Chundraboli's deed was executed, and for that reason had not been able to join in it.

Ram Kishore, accordingly, was in possession at the time of bringing this suit, but has since died. Chundraboli had died, it seems, in Bysack 1277 (May 1870), a few months after the execution of the deed. At this time the plaintiff's brother, Brojo Kishore, was alive, and was, if their case be true, jointly entitled with him. Brojo Kishore died in Agrahn 1275 (December 1871,) his heir being his mother who is said to have made a gift of her rights to her surviving son Joy Kishore, and the latter says that he, in consideration of a sum of Rs. 51,525 received, sold to plaintiff No. 2, a 14-annas share of the more valuable properties claimed and less shares in the remainder.

The plaintiff No. 2 is one Hurro Soondery Dabea Chowdhrain. defendants urge that she is a person without any means, that the alleged consideration never passed, and that the suit has been entirely got up, and is conducted by the sons of Hurro Soondery, Sreedhur, and Doorga Dass Acharjee, who are enemies of Ram Kishore, and have got Joy Kishore under their influence for the purpose of harassing the defendants, and it was, therefore, strongly contended on behalf of the respondents that the suit was malicious, groundless, and vexatious, and one which, on considerations of public policy, ought not to be entertained. It was moreover the defendants' case that the Privy Council had affirmed, and not denied the validity of the adoption by Chundraboli, merely deciding that it was inoperative for the purpose of defeating Bhoobun Moyee's rights.

These matters were set forth at much length in the answer of Ram Kishore, and Gogan, referring to those averments, added that if Ram Kishore had no rights, then he himself, and not Joy Kishore and his brother, was the heir of Bhowani Kishore.

By the judgment of the Subordinate Judge the whole suit of the plaintiffs was dismissed, we may say, on the following grounds :—

That as to the plaintiff, Hurro Soondery, she had no real interest whatever in the suit, and had never had the means of acquiring any; that her sons were the real promoters of it, and that her name was used in order to avoid any liability on their part for the defendants' costs.

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That the alleged sale of 14 annas share and so forth, and the passing of consideration were wholly untrue, no money having passed, the plaint having been settled long before the alleged bargain, the consideration being absurdly inadequate, and the plaintiff Joy Kishore being in fact a creature of the two men, Sreedhur and Doorga Dass.

That these considerations, however, would not affect the claim of Joy Kishore if he had any case.

That as to him, he would indeed be the heir in preference of Gogan, not by reason of the alleged infirmities of the latter, but because Gogan was the adopted and not the begotten son of Krishna Nath, the maternal grandfather of Bhowani Kishore, and because adopted sons, in his opinion, could not inherit in that line.

That, however, such preference could avail the plaintiff nothing, inasmuch as Ram Kishore was holding the estate by a sufficient and valid title, namely, as adopted son of Gour Kishore, the father of Bhowani Kishore, and so brother and heir to Bhowani.

That the judgment of the Privy Council was no impediment to his so holding, the object and meaning of their Lordships having been, as he understood it, not to declare the adoption of Ram Kishore bad, for all purposes, but merely to decide that it had no force to divest the estate of Bhoobun Moyee, Bhowani Kishore's widow, then in possession.

That if their Lordships' judgment contained no adjudication adverse to Ram Kishore's status as adopted son, it was too late to ask for it now, if indeed it had been asked for, seeing that Ram Kishore had occupied the position and been recognized as such for more than 30 years.

The Subordinate Judge also expressly says that the plaintiffs relinquished the prayer for an adjudication on this point.

The Court below pointed out, moreover, that the decision in favor of Bhoobun Moyee had been no impediment to Ram Kishore's performance of the needful rites and ceremonies for the benefit of Gour Kishore and even of Bhowani Kishore, and their paternal ancestors; that the succession of Ram Kishore after Bhoobun Moyee, brought about by the surrender by Chundraboli, had effectually carried out the aspirations of Gour Kishore

for his religious welfare, and that of his line, which aspirations it could not have been their Lordships' intention to frustrate.

The plaintiffs having appealed on the whole case, the defendants are, of course, entitled to rely on every one of these grounds to defeat their claim.

The first question which we have to consider is, the plaintiffs' right to sue.

If Gogan Chunder be what is called the "natural born son" of Krishna Nath, who was maternal grandfather of Bhowani Kishore, he is, without dispute, preferable heir to Joy Kishore and his brother; if he be the son of Kristo Mohun, adopted by Krishna Nath, he is still the heir according to our ruling on the point of Hindu Law. For the purpose, therefore, merely of our own decision, it is immaterial what his paternity was; but as the case may go further, it will be convenient to give our opinion.

Gogan is a man of advanced age; he was more than 70 years old when he was examined in the cause, and his adoption is said to have taken place in 1217 B.S., or 1810 of the Christian era. If he was adopted, he was only transferred from one brother to another, consequently there would be no change in his place of abode and title, if any, in his way of life. It is not surprising, therefore, if the fact has dropped out of recollection, and if evidence of it is difficult to obtain.

It is certain that several members of the family and friends, who have been examined say, it is known in the family that he was adopted, and moreover, there are petitions and proceedings from the Collector's office referring to a mutation of names so long ago as 1233 B. S. (1826), in which on the death of Krishna Nath, his widow Doya Moyee and brother and co-sharer Kristo Mohun severally petitioned the Collector in 1826, reciting the adoption and the right of the minor Gogan to a certain share in some immoveable property, whereupon a canongoe (who is a public officer) made an enquiry and reported that such adoption had taken place, and that Doya Moyee, in behalf of the minor, was in possession of his share.

Mr. Woodroffe, who was for the defendants, objected to these documents as inadmissible, but it is difficult to see how they

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can be excluded. They are public records of the Rajshaye Collectorate, copies having been obtained from the Collector's office at Bogra, doubtless because the land to which the proceedings related formed part of the territory made over from Rajshaye to the new Joint Magistracy (now district) of Bogra, when that newly-created office acquired revenue jurisdiction, first in 1832, with gradual extension afterwards, and the record would be transferred with the land.

It is likely enough that, of late years, so long after the event, the traces of adoption may have become faint, and Gogan may have been looked upon as the real son of Kristo Mohun. The Acharjees, and possibly the Chowdhries too, who are connected with them, seem to have been addicted to arrangements amongst themselves to meet the requirements of Hindu law and usage. In both families there are instances of one or more superfluous sons in one branch being made over to another, and in such arrangements (probably regarded as not concerning outsiders) precise accuracy of statement was not always adhered to, of which an example may be found in the judgment of the Privy Council of what took place in regard to the pretended will of Bhowani Kishore, when it is nearly certain that if the two ladies could have agreed on the subject, Ram Kishore would have been taken in adoption by Bhoobun Moyee under her spurious power, instead of by Chundraboli under her genuine power.

There is, no doubt, evidence tending the other way. It is remarkable that when Gogan was in the witness box, calling himself the son of Krishna Nath, no real cross examination on this point was attempted.

The expressive silence of Goloke Monee who, if Gogan was a son of Kristo Mohun, must have been his own sister, and who was asked point blank whose son Gogan was, is noticeable. She made no answer, and the plaintiff's pleader, thereupon, according to a curious practice of the Mofussil Courts, formally gave her up as a witness.

Upon the whole, although the matter is not free from doubt and perhaps either conclusion might be supported, we are not prepared to dissent from that of the Subordinate Judge, viz., that Gogan was really adopted.

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The next matter for consideration is, whether the plaintiffs, each in respect of the share which he or she claimed, ought to have been allowed to maintain the suit.

As to the plaintiff Hurro Soondery we have no hesitation in concurring with the Court below. We are satisfied that her part and claim in the suit are a mere sham; that she has no real interest; that neither she nor any person whom she may represent, ever acquired any by actual purchase, but that her share in the proceedings is merely a cover for the malicious interference of her sons, Sreedhur and Doorga Dass, who have got the plaintiff Joy Kishore into their hands, raked up the old claim of their father, and fomented this litigation for the purpose of annoyance to Ram Kishore, now dead.

For this claim is not absolutely new. During the pendency of Ram Kishore's suit against Bhoobun Moyee, Narain Acharjee, the father, had filed a petition of objection, as it was called, alleging himself to be entitled as nearest Gyanti. Similar petitions were filed by three other persons, and these all seem to have elicited the intervention of Gogan himself (printed at page 128 of the Paper Book) by a petition in which, at great length, he set out his own case impugning both the adoptions set up, and contending that none of the kinsmen had any claim to be put in competition with his.

The suit of Hurro Soondery, therefore, is clearly not maintainable.

Joy Kishore, however, will be entitled to recover, if he can make out a right to it, the definite share for which he sues, and no more.

The plaintiffs do not seek to recover the property jointly, but each asks for the share to which he asserts himself entitled; and we do not hold that considerations of public policy call upon us to dismiss the whole suit if the claim of one plaintiff be unaffected by the taint which is fatal to the other.

Assuming, therefore, for argument's sake, that Joy Kishore's claim is preferable to that of Gogan, has he a better title than the defendant Ram Kishore, or the infant son, on whom the deceased Ram Kishore's rights have now devolved? (Joy Kishore himself has also died since the commencement of the suit).

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It will be remembered that Bhoobun Moyee, after being maintained in possession by the judgment of the Privy Council, died, and Chundraboli succeeded as mother of Bhowani Kishore, but she immediately surrendered her rights in favor of Ram Kishore, by a deed, in which it was declared that he had been adopted in accordance with the directions of her husband, Gour Kishore, had regularly performed the *sradh* and other rites and ceremonies, and was, therefore, justly entitled.

Chundraboli might, of course, give up her own rights for her life, but she has since died, and the plaintiffs' case is, that the adoption of Ram Kishore was invalid, and has been so declared by the Privy Council, and that consequently the next heir of Bhowani Kishore will take.

On this part of the case two serious questions arise :—

1*st*.—Whether their Lordships' judgment wholly invalidates the adoption ;

2*nd*.—Whether Ram Kishore can be treated as the heir of Bhowani Kishore.

The first of these two questions is not free from difficulty. It is necessary to consider the circumstances under which the judgment was given, and then to apply the law of evidence.

This judgment was given upon appeal against a final judgment of the Sudder Dewany Adawlut, by which Ram Kishore, as a son adopted by Chundraboli, widow of Gour Kishore, in 1844, recovered possession of the estate which had been enjoyed by Bhowani Kishore, the begotten son of Gour Kishore, and had devolved, at Bhowani Kishore's death, upon his widow as his heir according to Hindu law.

It is to be observed that the last mentioned widow had, in 1843, herself adopted a son called Rajendro in pursuance of an alleged permission from her husband Bhowani, and this Rajendro having subsequently died after attaining majority, she alleged herself to have adopted another son named Kylas, and appealed to England in the capacity of mother and guardian of this Kylas, who, however, as we gather, also died while the appeal was pending. The deed of permission was found by the Sudder Court, and afterwards by the Privy Council, to have been forged.

According to the report in 10 Moore, page 301, Sir R. Palmer,

as counsel for the appellant, used the following argument :—"The important question arises, whether as such adopted son of the late Gour Kishore, the father of the appellant's husband Bhowani Kishore, who survived his father 23 years, and left the appellant his childless widow, and as such, his admitted heiress by the Hindu law, could displace and supersede the appellant as such heir in the possession of the estates which devolved on her husband as an absolute estate of inheritance. We submit that such a power of appointment, if exercised by a mother, was invalid, if the son left a widow, as her vested rights (Strange's Hindu Law, Vol. I, 134) would be defeated by its exercise;" and again :—"Bhowani Kishore succeeded to the ancestral estate and property by operation of law, as his father's sole heir, and not under any devise or bequest from him, and the estate and property being in him, as admitted by the decree as an absolute estate of inheritance, vested, on his death, in the appellant, as his widow and heiress, therefore, her title and interest therein could not be displaced or divested by the act of Chundraboli Dabea subsequently adopting a son, so as to vest the estate and property in such son as heir-at-law, not of the appellant's deceased husband, but of his father, whose interest in the same ceased and determined on his death."

This argument was answered on the part of the respondent Ram Kishore by the observation that "even if the forged deed was genuine, the claim of the appellant to her widow's rights was negatived by the alleged adoption of Kylas Kishore on Rajendro Kishore's death."

Apart, therefore, from the issues of fact relating to the several acts of adoption and the deeds of permission under which they purported to have been made, it is clear that the important, if not the only, question for their Lordships' decision was the validity of Ram Kishore's adoption for the purpose of ousting Bhoobun Moyee from the estate.

The judgment delivered by Lord KINGSDOWN, in the first place, disposed of the adoptions made by Bhoobun Moyee, both of which were "held in this suit to be invalid."

The judgment proceeded :—"The next question is, as to the validity of the adoption of Ram Kishore," and their Lordships

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then say that, while they see no reason to dissent from the Court below as to the genuineness of the *unoomuttee puttro* or regularity of the adoption, they think it "unnecessary to examine into the genuineness of this instrument, as we are of opinion that at the time when Chundraboli Dabea professed to exercise it, the power was incapable of execution."

Lord KINGSDOWN then, after adverting to the facts that Gour Kishore had in 1811 executed a deed of permission, providing for the case of his having no natural born son, that a son had been thereafter born to him, and that nevertheless two years later in 1819, he executed a further instrument, went on to discuss the nature of that instrument, and held that it was not a will or devise, but a mere permission to adopt.

His Lordship next observed that it undoubtedly contemplated more than one adoption and assigned no express limits to the time within which the power of adoption should be exercised. "But," the judgment goes on, "it is plain that some limits must be assigned," and this both on the presumable intentions of Gour Kishore, and by reason of the law. Upon one or two expressions which occur in this part of their Lordships' judgment, we shall have occasion presently to remark.

It is then pointed out that Bhowani Kishore had inherited, and had, in turn, had full power of disposition over the estate; that on his death he was succeeded by his wife, who would have been, as an heir, preferable to his natural brothers, if he had any. From this it followed that no one could, by being made a brother by adoption, take the estate from the widow when a natural born brother could not have taken even a part.

His Lordship said it was needless to consider whether Gour Kishore could have limited his son's interest; because, as a fact, he had not done so, and then stated: "The question is, whether the estate of his son being unlimited, and that son having married and left a widow his heir, and that heir having acquired a vested estate in her husband's property as widow, a new heir [to Gour Kishore] can be substituted by adoption who is to defeat that estate, and take as an adopted son what a legitimate son of Gour Kishore would not have taken," and this, their Lordships hold, could not be done, pointing out, however, that the case

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would have been otherwise if Bhowani had died unmarried, leaving his mother as his heir, for then the "adoption would have stood on quite different grounds. By exercising the power of adoption, she would have divested no estate but her own, and this would have brought the case within the ordinary rule, but no case has been produced, no decision has been cited from the text books, and no principle has been stated to show that by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son vested in possession, can be defeated and divested."

We thus have a suit to recover possession from the widow of (B) on the ground that plaintiff is adopted son of (A), who in his lifetime was B's father, dismissed by their Lordships on the principle thus concisely stated in Mr. Mayne's recent work on Hindu Law, page 161, that except in the cases specified, an adoption made to one person will not divest the estate of any one who has taken that estate as heir of another person.

If the objection had been taken that this judgment was not admissible as evidence or "relevant" between the present parties, we might have had some difficulty, for while in the former suit the parties were opposed as heirs of Gour Kishore and Bhowani respectively, in this they all make title under Bhowani, both widow and mother being out of the way.

But Mr. Woodroffe, as we understand him, contented himself with arguing that it could not operate as *res judicata*, and we think it clearly could not, not merely because the parties are different, but because, in fact, their Lordships did not intend to decide that Ram Kishore could never be the heir of Bhowani, still less that he was not duly adopted. The expression, "the power was incapable of execution," must be considered with reference to the question which their Lordships had before them. They notice, indeed, an inclination of the Sudder Judges to hold that "if Bhowani Kishore had left a son, or if a son had been lawfully adopted to him by his wife under a power legally conferred upon her, the power of adoption given to Chundraboli would have been at an end." But their Lordships do not so decide, and it is very doubtful whether it could be so held, and whether the terms of the second permission from Gour Kishore are not wide enough to enable Chundraboli to

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adopt, in extinction of the issue, either of the natural born son, or of the first, to be adopted son. But we have no occasion to decide this. What has happened being the death of Bhowani without having either had sons born to him, or given any permission to adopt. If, therefore, Chundraboli, immediately on the death of Bhoobun Moyee, had made an adoption and so divested her own estate, there would have been nothing in the judgment of the Privy Council, and nothing that we are aware of in the law to prevent her doing that which her husband authorized her to do, and which would certainly be for his spiritual benefit and for that of his ancestors and even of Bhowani Kishore.

It has been pointed out in the case of *Ram Soonderee Singh* vs. *Surbanee Dassee,* (22 W. R., 121) at page 123:—"The broad proposition for which the learned Counsel contends will, in great many cases, defeat the essential object for which every Hindu desires to adopt, viz., the continuance of the spiritual benefit to be conferred upon him after his death. An adopted son attaining an age of sufficient maturity and by performing the religious services enjoined by the Shastras, cannot exhaust the whole of the spiritual benefit which a son is capable of conferring upon the soul of his deceased father. Because these services are enjoined to be repeated at certain stated intervals, and the performance of them on each successive occasion secures fresh spiritual benefit to the soul of the deceased father (see note to verse 74 of section 4 of Sutherland's Dattaka Mimansa, where these rites are fully described.)

With all respect, therefore, we imagine that Lord KINGSDOWN must have said by inheritance, in reference to the idea of adopting a son to the great grandfather of the last taker, that at that time "all the spiritual purposes of a son, according to the largest construction of them, would have been satisfied;" and again, "Bhowani Kishore had lived to an age which enabled him to perform, and it is to be presumed, that he had performed, all the religious service which a son could perform for a father." There is really no time at which the performance of these services is finally completed, or at which the necessity for them comes to an end.

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Then if Chundraboli might have adopted at the date when Bhoobun Moyee's death caused the inheritance to devolve on her, with the consequence of divesting her own estate, is there any reason why Ram Kishore, if we suppose him to have been regularly adopted, and those who came before him as heirs to Bhowani Kishore out of the way, should not, in that state of things, take the inheritance which the mother gives up to him, and should not, to use the words of Mr. Mayne, be rewarded by the estate for the services which he renders to the deceased?

We think not. He had been adopted many years back, and as Chundraboli declared, had been performing the *Sradhs*, *turpun*, *purban*, and *Deb Sevas*, and there was "no other man but him to offer oblation of cake and libation of water to her husband, and his paternal ancestors, and to herself." And it seems to us, that although as heir to Gour Kishore he could not displace the widow and heir of a subsequent full owner, and as heir to Bhowani he came after the widow and the mother, he might, without objection, succeed when, by their successive deaths or surrender, he united in himself the capacities of heir to Gour Kishore and heir to Bhowani.

This conclusion answers the other question. The case is anomalous, but is reducible to rule. The adoption made Ram Kishore brother to Bhowani, and as a brother he would succeed in his proper place and order.

On all grounds, therefore, and upon every principle of equity and justice, we think the defendant was entitled to the judgment of the Court.

We consequently affirm the decision of the Subordinate Judge, and dismiss this appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

1879
May 30th.

No. 2033 of 1878.

JUNMEJOY MULLICK . . . (DEFENDANT) APPELLANT;

AND

DWARKA NATH MYTI . . . (PLAINTIFF) RESPONDENT.

Evidence Act (I of 1872), section 83—Map made by the authority of Government—Collectorate Map.

The plaintiff, in a suit for possession of certain lands which he claimed as belonging to a mouzah which he had purchased from the Government, produced in support of his claim a map of the mouzah made by the Collector in 1859, while the mouzah was in the khas possession of the Government: *Held*, that it was not a map purporting to have been made by the authority of Government, and could not, therefore, be presumed, under section 83 of the Evidence Act, to be accurate.

APPEAL from a decision passed by the Second Subordinate Judge of Midnapore, affirming the decree of the Officiating Sudder Moonsiff of that district.

The principal question to be decided in this suit was whether certain lands belonged to the mouzah of the plaintiff or of the defendant.

The plaintiff alleged that the lands in question had been included in a mouzah named Hijultola, purchased by him from the Government, but that subsequently to his purchase, the defendant's predecessor in title had fraudulently caused them to be included in the survey map which was directed to be made in the zillah in 1873. In support of his allegation he produced a Collectorate map of Mouzah Hijultola made by the Collector in 1859, while the mouzah was in the khas possession of the Government, and also called witnesses in support of his case. The defendant likewise called witnesses for the purpose of proving the payment of rent by the ryots upon the disputed land, to his predecessor.

The lower Courts both found in favour of the plaintiff, relying chiefly on the Collectorate map. It does not appear that any one was called to prove this map. The Subordinate Judge

says: "It is quite clear to me that the Collectorate map of 1859, relied upon by the Court below, could be treated as evidence, and should be presumed genuine under section 83 of the Evidence Act. The map was prepared under the authority of Government and not for any disputed cause."

The defendant appealed on the ground that the map ought not to have been admitted in evidence.

Baboo *Nullit Chunder Sein*, for the Appellant.
Mr. *H. E. Mendies*, for the Respondent.

The judgment of the Court (1) was as follows:—

This is a suit to recover possession of 31 bighas and 5 cottahs of land as appertaining to Mouzah Hijultola. A dispute arose between the plaintiff and defendant as to the boundary of their respective villages during the survey of 1873. The defendant, who is the owner of Mouzah Kasiabheri, claimed the disputed land as appertaining to his mouzah. The Survey Authorities decided that question in favor of the defendant, and the lands in suit were included in the survey map of Kasiabheri. The plaintiff has, therefore, brought this suit for the rectification of the survey map, and also for recovery of possession of the lands in dispute. The Courts below have decreed the claim of the plaintiff.

One of the documents produced by the plaintiff in support of his claim is a map of Mouzah Hijultola prepared by a Government Officer when it was in the possession of Government as a Khas Mehal. The lower Courts have admitted this document as evidence in the case, under section 83 of the Evidence Act, and it seems to us from the judgment of the lower Appellate Court that it was to a very great extent influenced in its judgment by this document. The contention raised before us in special appeal is, that the lower Courts were in error in treating this document as evidence under section 83 of the Evidence Act. In fact the special appellant contends that this document is not admissible in evidence at all.

(1) MITTER and TOTTENHAM, *J.J.*

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We are of opinion that the lower Courts were in error in holding that this document was admissible as evidence under section 83 of the Evidence Act. That section says :—"The Court shall presume that maps or plans purporting to be made by the authority of Government were so made and are accurate, but maps or plans made for the purposes of any cause must be proved to be accurate." Now this map does not purport to be made by the authority of Government within the meaning of this section. It was a map prepared by an officer of Government while he was in charge of a Khas Mehal, the Government being in possession of that mehal merely as a private proprietor. It seems to us clear, therefore, that the document in question does not come within the purview of that section. But we are not prepared to hold, as contended for by the pleader for the appellant, that this map is not admissible in evidence at all. It may be admissible as evidence under section 13 of the Evidence Act, but it is one thing to treat it as mere evidence of possession or of assertion of right under section 13, and it is another thing to presume it to be accurate under section 83 of the Act.

We think, therefore, that the error complained of has materially affected the merits of the decision of the Subordinate Judge in this case. We accordingly set aside his judgment, and remand the case to him for re-trial. Costs will abide the result.

[CIVIL APPELLATE JURISDICTION.]

SHEIKH ALLIJ HOSSEIN (JUDGMENT-DEBTOR) APPELLANT;

AND

SHEIKH MUZHUR HOSSEIN AND ANOTHER (DECREE-HOLDERS) RESPONDENTS.

1879
June 24th.

No. 66 of 1879.

Execution of Decree, Refund of money overdrawn in—Act XXIII of 1861, *section* 11—*Act X of* 1877, *section* 244—*Limitation Act* (*IX of* 1871) —*Laches.*

In execution of a decree the property of the judgment-debtor was sold, and on an account being taken, a certain sum therein appearing to be due was paid in December 1868 to the decree-holders. Subsequently, on the application of the judgment-debtor, the account was re-opened, and finally it appeared, in 1875, that a larger sum than was actually due had been drawn by the decree-holders. In 1876 the judgment-debtor applied to the Court which executed the decree for an order for the repayment of the amount overdrawn. *Held*, that, while the application was not barred by any provision of the Limitation Act, IX of 1871, the English doctrine of *laches* did not apply in this country; and further that the application had been presented in the proper Court, as required by section 11 of Act XXIII of 1861, (corresponding with section 244 of Act X of 1877.)

APPEAL from an order of the Officiating Judge of Patna, affirming the order of the Subordinate Judge of that district.

In this case the property of the appellant was sold in execution of a decree. The proceeds of the sale, amounting to Rs. 1,725, were taken out of Court by the decree-holders, the respondents, on the 10th December 1868.

From an account subsequently prepared by order of the Court, it appeared that at that date there was due upon the decree the sum of Rs. 1,477-6-3 only, and that Rs. 247-6-3 were therefore overdrawn.

More than three years after the withdrawal of the money the judgment-debtor made an application to the Court in which the execution proceedings had taken place for an order for the repayment of the sum overdrawn, but the application was rejected on the ground of limitation.

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Judgment.

AINSLIE, *J.*

An appeal, which was thereupon preferred to the District Judge, was dismissed on the ground that the application could not be entertained in the Execution Department, the Judge adding that, although there was no clear law of limitation applicable, such applications for the enforcement of stale demands ought to be discouraged on grounds of public policy.

Against the order of the District Judge the judgment-debtor now preferred a second appeal to the High Court.

Mr. *H. E. Mendies*, for the Appellant.

Baboo *Saligram Singh*, for the Respondents.

The following judgments were delivered by the Court (1) :—

AINSLIE, *J.* :—

It appears to me that the judgments of the Courts below are wrong, and must be set aside.

The account which was taken in December 1868 was afterwards used as the basis of further proceedings in execution of decree; but in September 1874 the judgment-debtor raised a question as to the correctness of that account, and asked that it might be revised and the interest calculated at a rate lower than that fixed by the bond. The judgment-creditor objected to this, but his objection was over-ruled eventually in appeal, and the debtor succeeded in getting the account revised. On that revision it appeared that the sum of Rs. 247-6-3 had been overdrawn by the creditor in December 1868.

The final order in this matter was made in July 1875; and on the 6th of June of the following year, the present appellant asked for a refund of the amount which had been taken in excess from him. It has been refused by the Courts below, and the debtor has appealed.

In the Limitation Act of 1871 no special period of limitation is provided for such an application as this; but if we are to treat this application for restitution as analogous to an application to execute a decree, the debtor would have a period of three years from the date of the order of July 1875 within which to make it.

(1) AINSLIE and BROUGHTON, *JJ.*

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Judgment.

AINSLIE, *J.*

It, however, does not appear that the Limitation Act can be applied, and there is no ground for the judgment-creditor saying that this claim for restitution is barred by neglect to pursue his remedy. The result of the proceedings in 1875 determined that a certain sum was due under the decree in 1868, and that a sum in excess of that had been taken out of Court. Until the question whether the decree ought properly to bear interest from the date of the decree at the rate of 12 per cent. or a higher rate was determined, it was impossible for the debtor to say whether there was any surplus in his favor, or whether he would still be indebted under the decree. His right to recover arose on the making of the order of July 1875. He came in within one year from that date, and appears to have used due diligence. This is a question respecting money paid in execution of a decree, and therefo re under section 11 of Act XXIII of 1861 it must be disposed of by the Court executing the decree and not by a separate suit.

The effect of the order made by the Courts below has deprived the debtor of a sum of money which was taken from him by a compulsory process in execution of decree. It cannot be said that the payment was a voluntary one. He is, therefore, entitled to recover the sum overdrawn by the creditor, namely, Rs. 247-6-3, with interest from the 30th of July 1875 at six per cent., and all costs incurred by him since that date, together with the costs of this appeal.

BROUGHTON, *J.*:—

BROUGHTON, *J.*

I am of the same opinion.

The payment of Rs. 1,275 by the judgment-debtor in December 1868 was a payment made in consequence of a decree having been passed against him, and an account having been made showing that a balance of Rs. 732 was still due from him. That account was not a final one, but subject to revision, and appears to have been subsequently revised. The decree having been made, and the account shewing in the first instance this balance against him, the judgment-debtor was obliged to make this payment in order to save himself from the consequences of not doing so, namely, that interest would run; but till he was not satisfied with the taking of accounts, and on

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BROUGHTON, *J.*

his application they were re-opened, and it was found that a sum of money, namely Rs. 247-6-3, was due to him.

It appears to me that this is exactly one of those cases in which section 11 of Act XXIII of 1861 applies—a question arising in execution of decree between the parties under that section, and one which would fall under section 244 of the new Code.

With regard to the question of limitation, the Act of 1871 does not provide a general rule as to the bar by limitation in cases of applications, but specific rules with reference to certain applications set out in the schedule to that Act, and this case is not provided for in that schedule. As there is no rule there is no bar. The rule applied in the English Courts of Equity as to the doctrine of laches does not apply to this country. It has been so decided in two cases by the Madras Court. Those cases have been acted on in the interpretation of the Act of Limitation in this country. As pointed out by Mr. Justice AINSLIE, if this case was governed by the rule applicable to cases of execution of decrees, that is, the rule of three years' limitation, then, as the question of accounts was settled in 1875, the application of the debtor, being made in 1876, was made in time.

[CRIMINAL REVISIONAL JURISDICTION.]

July 28th.

No. 204 of 1879.

THE EMPRESS . . . . . .

AND

GONESH DOOBEY AND ANOTHER . . . . . .

Indian Penal Code, sections 304, 304 *A.*

Where the accused, a snake-charmer, exhibited a recently captured venomous snake, a cobra, without having extracted the poison, and in doing so placed it upon the head of a boy who took fright and was bitten in the hand, and died shortly after from the effects of the bite, *held*, that the accused was punishable, not under section 304 A., for causing death by a rash or negligent act, but under section 304 of the Penal Code, as having done an act, which had resulted in death, with the knowledge that it was likely to cause death, but without any intention to cause death.

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THE EMPRESS v. GONESH DOOBEY

Judgment.

CRIMINAL REFERENCE under section 263 of the Code of Criminal Procedure, by the Officiating Additional Sessions Judge of the 24-Pergunnahs.

The reference was made under the following circumstances:—A snake-charmer named Gopi, caught a venomous snake, a cobra, and refusing to extract the poison, some days later, on the 26th May last, began to exhibit it. He was joined by one Gonesh Doobey, and a crowd of spectators collected, among whom was a boy named Brojo, whom Gonesh selected as a suitable person to help them in showing off their dexterity with the snake.

It would appear that Brojo's parents objected to his being placed in such a position of danger, but allowed Gonesh to overrule their objections.

Gonesh put the snake upon the boy's head, but removed it when the father objected, only, however, to replace it a moment later. The boy took fright, and, in trying to push away the snake, was bitten on the hand and died shortly after.

Gonesh and Gopi were both tried before the Sessions Court.

The Jury were of opinion that these exhibitions were warranted by custom; that there was no intention to kill the boy; that virtually his parents consented to the boy being used for the purpose of exhibition by the accused persons; and that the death was purely the result of an accident.

The Sessions Judge was unable to concur with the Jury, being of opinion that, as the accused persons, both being by training snake-charmers, were well aware of the deadly nature of the snake, it was the grossest act of rashness and negligence on their part to cause the boy to risk and lose his life, and that the case, therefore, clearly fell within section 304 A. of the Indian Penal Code.

The judgment of the Court (1) upon the reference was as follows:—

The Officiating Additional Judge of the 24-Pergunnahs, differing from the Jury, has referred this case to the High Court under section 263 of the Code of Criminal Procedure.

The facts of the case are fully stated in the order of reference. We think that the offence committed by the prisoner Gonesh was

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an offence under section 304 of the Indian Penal Code. He did not intentionally cause the boy's death, nor did he, knowing that the act was "so imminently dangerous that it must, in all probability, cause death," put the snake upon the boy.

Judgment.

The case put by the prosecution, and referred to by the Judge in the charge, was one in which the prisoner actually caused the snake to bite the person who was killed. It differs, as the Judge remarks, materially from the present case, because then there was clearly the knowledge of imminent danger that must in all probability cause death.

The Judge, in referring the case, was of opinion that the prisoners should be punished under section 304A; but this section does not apply to the present case, in that for the reasons stated above we consider that the "rash act" did amount to culpable homicide.

We think it may be said in this case that Gonesh did not think that the snake would bite the boy. But we think that the act was done with the knowledge that it was likely to cause death, but without the intention of causing death. We think Gonesh should be sentenced to three years' rigorous imprisonment.

Gopi, we think, abetted Gonesh, and is punishable under sections 114 and 304, Indian Penal Code, but as he took a less active part in the matter, he should be rigorously imprisoned for one year only.

We sentence the prisoners accordingly.

(1) McDONELL and BROUGHTON, *J.J.*

[CIVIL APPELLATE JURISDICTION.]

BUKRONATH SING AND ANOTHER . . . APPELLANTS;

AND

RAJAH NILMONI SINGH . . . . . RESPONDENT.

1879
June 9th.

No. 1 of 1877.

Jageer Tenure, Nature of—Execution of decree against former holder of Jageer Tenure—Service Tenures.

Plaintiff's father, who was the jageerdar of certain mouzahs, died, while proceedings in execution of a decree obtained against him by the defendant, who was the zemindar, were pending. The jageer in question was held subject either to appointment or approval, the holder being bound to perform certain duties of a public nature. The proceedings were revived against the plaintiff as his father's representative, and three villages comprised in the jageer, and in the possession of the plaintiff as jageerdar, were attached and sold, the tenure being described in the proclamation as an ordinary rent-paying tenure, and the defendant became the purchaser. The plaintiff objected to the attachment and sale, but his objection was over-ruled. In a suit by the plaintiff, who admittedly held as jageerdar, for confirmation of possession of the property attached, *held*, (AINSLIE, *J.*, *dissentiente*, reversing the decision of MARKBY, *J.*,) that the attachment was not warranted by law, the tenure not being heritable, and that the plaintiff was entitled to retain possession notwithstanding the sale.

Per JACKSON, *J.*—(*Officiating C.J.*)—The restrictions on the tenure appear conclusively to show that the plaintiff did not hold the mouzahs as property of the deceased judgment-debtor which had come into his possession, but that he held them as a quasi-public servant in precisely the same tenure as his father had held them, and that the father's interest was strictly limited to his own life and performance of the functions. The restrictions appear sufficient to deprive the jageer of the character of simply heritable property.

Per AINSLIE, *J.*—In the absence of any special law upon the subject the zemindar has the same means of enforcing his demands against the sub-tenant as any other zemindar, and he may, therefore, sell the tenure for arrears of rent, and the fact that the tenant for the time being may be bound to render certain public services cannot interfere with his right to resort to sale for the recovery of his rents. * * * * * * It seems also that the tenure is equally saleable for the debts of the holder.

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Per WHITE, *J.*—A purchase of the subject of sale, as described in the proclamation, did not pass the tenure which the plaintiff had, or which his father had, in the mouzahs in question.

Statement.

LETTERS PATENT APPEAL from the judgment of a Division Bench, in which the opinion of Mr. Justice MARKBY, as the Senior Judge, prevailed over that of Mr. Justice MITTER, reversing the decision of the Officiating Judge of West Burdwan.

The suit originally commenced in the Court of a Moonsiff in the District of West Burdwan, but was afterwards transferred to that of the District Judge, as it appeared to have been greatly under-valued. Bukronath Sing, the plaintiff, asked for a confirmation of possession and declaration of title in respect of Mouzahs Dekhia and others, which he alleged himself to be holding as his jageer mehal subject to, and in consideration of, the performance of certain public duties. It appeared that his father had in like manner held these mouzahs; that the defendant, who was the zemindar, having an unsatisfied decree against the father, had attached the mehal as the property of the judgment-debtor, and notwithstanding the plaintiff's objection, caused it to be sold in satisfaction of such decree. Plaintiff alleged that he had not obtained the mehal by inheritance from his father, who was not the owner thereof, and that it could not lawfully be sold in execution of a decree made against the deceased jageerdar. The Government, which really supported the plaintiff, was made a *pro formâ* defendant.

The defendant Rajah maintained that the mouzahs in question were no jageer, but a part of his mal estates, which had been settled with plaintiff's father in remuneration for services of a private character, and held at varying rates of rent, and he stated that the original Taruff Dekhia had been divided into two parts, one of which was now in dispute, while, as to the other, his "mal" right had been conclusively established by a decision of the High Court.

The written statement of Government was to the effect that the mouzahs were police service lands and not alienable, and therefore the Rajah, having caused the sale without specification of the jageer character of the lands, and having bought them in

execution of his own decree, had acquired no title, and that, although the mehal included lands held by *tabedars* or subordinate police officers, the plaintiff as *Sirdar* jageerdar was competent to maintain the suit.

The suit came on for trial before Mr. Tweedie, the Judge of West Burdwan, who treated the Government as the real plaintiff. He found that the tenure was both service and rent-paying; that the performance of the service gave the chief title to the land; that the service was of a public and not of a private nature; that the tenure (or the plaintiff's interest in it) was not ordinarily saleable in satisfaction of a debt of his predecessor, and that the Rajah, in particular, was disabled from purchasing. He consequently held that the plaintiff was entitled to judgment.

On the appeal Mr. Justice MITTER came to the following conclusions:—

1. That inasmuch as one-third share of the assets of the mouzahs had been excluded from account in fixing the assessment at the permanent settlement, the Government had not to that extent parted with the ownership, and the jageerdar consequently held both under Government and under the zemindar.

2. That the right of appointment was in the Government.

3. That each successive holder took not by inheritance, but as jageerdar under the conditions of the grant.

4. That the nature of a jageerdar's interest was in all essential particulars like that of a Beerbhoom ghatwal, as defined by Regulation XXIX of 1814.

5. That such interest consequently could not be sold on account of the debts of a predecessor.

Mr. Justice MARKBY, on the other hand, agreed with the Court below that the plaintiff did not hold as appointee of the Rajah, but also held that no appointment by the Government would entitle an appointee to hold these lands; that no sale rule of law forbade the alienation of lands of which the holder owed some service to the Government; and that nothing prevented the Rajah himself from becoming a purchaser.

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Paul (*Advocate-General*), and Baboo *Annoda Persaud Banerjee*, for the Appellants.

Baboo *Mohesh Chunder Chowdhry*, and *Bhowany Churn Dutt*, for the Respondents.

Judgment.

The following judgments were delivered by the Court (1) :—

JACKSON, J.

JACKSON (*Offg. C.J.*) after stating the facts continued as follows:—

A certain element of difficulty has arisen in this case from something like a conflict of decision between two Division Benches of this Court, with regard to the two divided parts of Turuff Dekhia. On the one hand, there is a judgment in 10 W. R., 255, delivered by myself, between these very parties, in which it was expressly held that this tenure was not liable to be sold for the debt of the late jageerdar, the debt being an arrear of rent due from the mehal: on the other hand, there is a decision of the late Mr. Justice D. N. MITTER and my brother AINSLIE between the Rajah and the other half jageerdar that the right to appoint with a resulting title to enjoyment of the land was not in the Government but in the zemindar. This, it is true, is not the precise point for decision in the present suit, but it was regarded both by the Court of First Instance and by Mr. Justice MARKBY as having at least an important bearing on the decision.

In these circumstances I feel bound to say that, as a matter of principle, this appears to me to have been a case in which a reference to the Full Bench would have been proper. For myself, however, as will appear from the view which I take of this case, the judgment in question is not a difficulty in my way. For the purposes of the present appeal, it seems to me immaterial whether the right to appoint the jageerdar of these mouzahs rests with the Government or with the zemindar. I take it to be admitted that plaintiff's father was, and that plaintiff is, the duly appointed jageerdar.

(1) JACKSON (*Offg. C.J.*,) AINSLIE and WHITE, *J.J.*

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Judgment.

JACKSON, *J.*

The Rajah, it appears, brought a suit against the father to recover possession of some lands quite unconnected with the jageer. He got a decree for possession and costs amounting to Rs. 72, and it was in execution for costs that the proceedings took place, which have given rise to the present suit.

The decree being against Beer Singh, and Beer Singh having died before execution fully had, section 210, Act VIII of 1859, authorized an application to execute the decree against his legal representative, and such execution would be permitted in the manner described by section 203. That section permitted attachment and sale of "property of the deceased person," and it seems to me that the principal question which we have to consider is, whether Mouzahs Dekhia and others were property of the deceased which had come into the plaintiff's possession. The jageer in question was not enjoyed by Beer Singh without conditions, nor was it a simple inheritance. The holder of it was bound to perform certain duties of a public nature. Mr. Justice MARKBY observes that the character of these services was exceedingly indefinite, but that is precisely what might have been expected. It was not the practice of the country and of those times to define exactly the nature of services to be rendered in consideration of a grant. Both parties, grantor and grantee, designedly left it vague and elastic. The grantor trusted that superior power would make the conditions capable of extension in any direction required, and the grantee relied on the indolence or negligence of his superior to make the compliance with these conditions in general easy. The vagueness of the service required, therefore, is not to be taken as denoting insignificance.

The duties then were to be performed and performed as the condition of holding the jageer which the Government had endowed by setting aside a third of the profits of the land, and no one could perform the duties unless he were appointed or approved.

Mr. Justice MARKBY admits that he did not perform them as appointee of the zemindar, and it seems to me impossible to escape the conclusion at which Mr. Justice MITTER has arrived,

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viz., that the ultimate right of appointment as of dismissal rested with the Government. In connection with this part of the subject, as we seem to be in some danger of neglecting or forgetting the ancient law of the country, I think it well to fortify myself by the authority of the eminent author of the Analysis of the Regulations, Mr. J. H. Harington.

In the judgment of the Division Bench, on which Mr. Justice MARKBY relies, I find the following passage, which I assume to be in accordance with the evidence to the case:—"On examining the figures given in this statement it appears that no difference whatever was made between what are called jageer villages and the other villages of the estate; while no right is claimed for the Government except the right to exact a certain share of the produce as land revenue. The conclusion, therefore, seems unavoidable that Government, after the decennial settlement, retained no interest in the land, except the right to receive rents from it as from all other lands not especially exempted. The fact that the Government officers encroached upon the rights of the Rajahs by habitually treating these lands as if they belonged to the class of Digwaree jageers is no more evidence of their right than is the document, set out by the respondent at page 127 of the printed book, proof that the Government officers had a right to compel the izaradars of Mouzah Dhekia to furnish rations for their camp, though apparently they did so."

In the present case Mr. Justice MITTER gives it as the result of an examination of the settlement record that the Government had set aside as the jageerdar's emolument one-third of the assets which accordingly were not included in the jumma which was the basis of settlement with the zemindar.

Now let us turn to Mr. Harington (3 Anal., 509). After mentioning Regulation XXIX of 1814 he goes on:—"Tenures of this description were mentioned generally in a note to the 2nd volume of this analysis as held at a low rent by ghatwals or guards of passes. They exist to a considerable extent in all the hilly districts on the western frontier of Bengal, and appear for the most part to have originated in assignment of lands for the protection of the ghats and villages near the hills. There is, how-

ever, a material difference in the tenures of ghatwals. Those of Tirhut and Deogur, in the district of Beerbhoom, to whom provisions of Regulations XXIX of 1814 immediately relate, have a defined and permanent interest in the lands which compose their respective mehals, and which consist of entire villages or more extensive tracts of land; whereas the sirdar and inferior ghatwals in the contiguous zemindari of Ushenpore have small and specific portions of land in different villages, assigned for the maintenance of themselves and of the *Paiks* and Chowkeydars acting under them, of a nature analogous to the Chakran assignments of land to village watchman in other districts. The ghatwali tenure, however, as ascertained from the result of enquiries made by the Magistrate of Zillahs Burdwan, Beerbhoom and Jungle Mehals, and communicated to the Court of Nizamut Adawlut in the year 1816, differs essentially from the common Chakran in two respects: First, that being expressly granted for purposes of police, at a low assessment, which has been allowed for in adjusting the revenue payable by the landholders to Government at the formation of the permanent settlement, the land is not liable to resumption, nor the assessment to be raised beyond the established rate at the discretion of the landholders; secondly, that although the grant is not expressly hereditary and the ghatwal is removable from his office and the lands attached to it for misconduct, it is the general usage on the death of a ghatwal, who has faithfully executed the trust committed to him, to appoint his son, if competent, or some other fit person in his family to succeed to the office." He proceeds:—"The above discrimination between the ghatwalee tenure, which being an appropriation of land at a low jumma for a police establishment, may be considered within the 4th clause of section 3, Regulation I of 1793; and the common Chakran assignments in lieu of wages to zemindary servants which have been annexed to the malgoozari lands, and declared responsible for the public assessments by section 41, Regulation VIII, 1793, is taken *verbatim* from a letter written by order of the Nizamut Adawlut to the Calcutta Court of Circuit, on the 30th October 1816. It is probable that some specific provisions may hereafter be enacted for defining more exactly the rights of the ghatwals referred to. At present, however, those of Zillah

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Judgment.

JACKSON, J.

Beerbhoom only are included in the enactments of Regulation XXIX, 1814.

The terms of Regulation I of 1793, section 8, clause 4, are as follows:—"The jumma of those zemindars, independent talookdars and other actual proprietors of land, which is declared fixed in the foregoing articles, is to be considered entirely unconnected with, and exclusive of, any allowances which have been made to them in the adjustment of their jumma, for keeping up thannahs, or police establishments, and also of the produce of any lands which they may have been permitted to appropriate for the same purpose; and the Governor-General in Council reserves to himself the option of reserving the whole or part of such allowances or produce of such lands according as he may think proper, in consequence of his having exonerated the proprietors of land from the charge of keeping the peace, and appointed officers on the part of Government to superintend the police of the country. The Governor-General in Council, however, declares that the allowances or produce of lands, which may be resumed, will be appropriated to no other purpose but that of defraying the expense of the police, and that instructions will be sent to Collectors not to add such allowances or the produce of such lands to the jumma of the proprietors of lands, but to collect the amount from them separately."

It seems to me, as it evidently did to Mr. Harington, that the reservation is one that would be within the meaning of this clause, and therefore it clearly cannot be said, in this case, that the Government had no interest reserved, although it had bound itself to hold the reserved allowance applicable to certain purposes only, and it seems to follow most plainly that the reserved one-third is held by the jageerdar directly from the Government as it forms no part of the zemindar's jumma.

But, as I have already said, it appears to me needless for the purpose of the present appeal to determine with whom the appointment lay. What is material is this—that the incoming jageerdar took the land subject to either appointment or approval and with an attached burthen of public duty. These two restrictions appear to me conclusively to show that the plaintiff did not hold these mouzahs as "property of the deceased judgment-

debtor which had come into his possession," but that he held them as a *quasi*-public servant in precisely the same tenure as his father had held them, and that the father's interest was strictly limited to his own life and performance of the functions. However slight the restrictions on succession, and in whosoever hands they rested, they appear to me sufficient to deprive the jageer of the character of simply heritable property.

I am, therefore, of opinion that the creditor acted without warrant of law in attaching, and that the Moonsiff's Court had no authority to sell the tenure then in possession of plaintiff as jageerdar, and that the plaintiff is entitled to be retained in possession thereof, notwithstanding the sale. The claim which he preferred was, perhaps, less a claim under section 246 of the repealed Code than an objection to the procedure adopted. But this is not very important. I have felt myself bound to base my judgment on the reason which I have just stated, although there is another and perhaps a shorter ground, viz., that the sale complained of has not passed the tenure of which the plaintiff is the holder. As to this latter question, I am in doubt whether it has been properly raised in the earlier stages of the case. It was not one of the issues framed, nor is there any reference to it in the judgment of the Court of First Instance, until we find it taking its place as the first of several particulars in which the Judge, " applying the principles adopted in the judgment and the finding on the several issues," considers the sale to be faulty.

The defendant Rajah, it is true, is not deserving of much consideration. He has sought by this proceeding to compass an end after which he has been striving for many years. He has in his written statement advanced allegations which not only are absolutely untrue, but as to which he is distinctly concluded by the decisions arrived at in previous litigation of his own seeking. But I should not wish him to be able to say that his appeal had been lost upon an issue not raised in either of the previous hearings, and which, perhaps, might be more fitly raised in a suit on his part to obtain possession.

The plaint asks for a declaration of the plaintiff's title and for maintenance in possession. To so much relief, I think, he was

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entitled. I would, therefore, reverse the judgment of the Court below, and restore that of the District Judge in so far as it gave him that relief.

The result is that the judgment of Mr. Justice MARKBY will be reversed, and the decree of the Court below will be affirmed.

Judgment.

AINSLIE, *J.* :—

AINSLIE, *J.*

The plaintiff's case is that he, as a jageerdar performing public duties, holds a jageer comprising Mouzah Dekhia, and other villages under the Government; that the Rajah of Pachete, having obtained a decree for the costs of a certain suit against his (plaintiff's) father, attached these villages in execution thereof; that he thereupon objected to the same being attached under section 246, Act VIII, 1859, but the objection was over-ruled, and hence it has become necessary for him to establish his title by a regular suit.

The Rajah denies the title of the Government to these lands, which he claims as appertaining to his perpetually-settled Estate, and alleges that they were granted to his (plaintiff's) ancestor as a service tenure, and that they are liable to be sold to satisfy debts due by the plaintiff's father.

The subject of the present suit is a portion of that originally formed one holding, which was divided in 1818, between Guru Churn Mozoomdar and Dhurm Das Chuckerbutty.

The Rajah has undoubtedly failed to establish the alleged grant for personal service.

It is established that the jageer is an ancient one of unknown origin.

There was, at the time when the British Government was first established, a chain of ghatwali tenures extending from Bhagulpur southwards to Midnapur. The Bhagulpur ghatwalis have been the subject of much litigation between the Government and the Rajah of Khurukpur which terminated in favor of the latter (see the case of *Raja Lelanund Singh* vs. *Government of Bengal*, 6 Moore, I. A., 101).

Their Lordships of the Privy Council came to the conclusion that the Khurukpur ghatwalis formed part of the permanently-settled estate of the Rajah, and were included in this assessment,

and that they could not properly be described as Thannadari or Police lands.

The Beerbhoom ghatwalis are the subject of express legislation (Regulation XXIX of 1814).

Those to the south of Beerbhoom were not dealt with in this way. The Government has left them unnoticed. One of these is the subject of the present appeal.

This was undoubtedly included in the permanent settlement of Pachete, and the Rajah is responsible to Government for due payment of revenue, and subject in respect thereof to the stringent rules for the realization of Government revenue. It is immaterial for the purposes of this appeal whether the revenue was assessed on the gross income of the land or after a deduction of one-third.

It seems to me that inasmuch as the Zemindar is responsible to Government for punctual payment of the revenue, he must, in the absence of any special law on the subject, have the same means for enforcing his demands against the sub-tenant as any other zemindar: and therefore if the tenant falls into arrears he may recover rents by the same process that is available to other zemindars, and may therefore sell the tenure for arrears of rent accruing due thereon; and the fact that the tenant for the time being may be bound to render certain public services cannot interfere with his right to resort to sale for the recovery of his rents. He may therefore sell the subject to its incidents, and not merely the personal interest of the indebted holder as an interest for life subject to be determined by the action of Government for failure to discharge the duties attaching to the holding of the land: and such right cannot be defeated by the death or dismissal of a ghatwal. The permanent settlement, while imposing certain obligations, conferred corresponding rights which, in the absence of any express agreement at the time or since, can only be curtailed by legislation. If this view is correct, it follows from it, in my opinion, that the tenure is equally saleable for other debts of the holder.

If he incurs debts it makes no difference whether he applies the profits of the estate to paying them while he allows his rent to fall into arrears, or uses them to pay his rent while he allows other debts to accumulate.

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Judgment.

AINSLIE, J.

It seems to me that the tenure is as much saleable in the one case as the other, though there may be different consequences of a sale according as it may be under the ordinary procedure for realizing decrees for money.

The fact that the Government thought fit to make special provisions for the Beerbhoom ghatwals, and left those to the south unprovided for, shows that they intended to leave the latter to be governed by the general law of Bengal. If the provisions of existing Regulation were not expressly applicable to these as they were declared by the preamble of Regulation XXIX of 1814 not to be to the former, why was the Regulation then restricted in its operation to Beerbhoom and never since extended?

That Regulation fully recognizes the zemindar's rights under the permanent settlement (section III), and gives him a guarantee for punctual payment of the rents due to him (section IV), as the Government undertakes not only to pay surplus over revenue assessed of rents collected, but surplus of rents assessed, and, by section V, any increased rents are to go to the zemindar. In consideration of this the Government thought fit to make a special rule for the succession to those lands, and though this has been held, in 8 Weekly Reporter, page 178, to give each successive tenant an estate unencumbered by his predecessor, this decision was expressly based on the words of the Statute. It has also been held, in the case of *Mussamut Kustoora* vs. *Monohur Deo*, W. R. Gap. Vol., p. 39, that a female can succeed, so that personal service is no part of the condition of the holding; and that this is not a necessary condition even in the Beerbhoom ghatwalies is evident from the provisions of section V for recovering arrears by public sale as in the case of other lands held from the Government.

The fact of certain services being attached to the possession of the tenure in suit is, therefore, clearly no ground for holding that it is not transferable by sale. The fact that the Government can dismiss a ghatwal and so cut off the descent does not destroy the generally hereditary character of the holding or make these lands, when included in the permanent settlement police lands, resumable by Government under clause 4, section 8, Regulation I of 1793. Whether any part of the rent, which may have been allowed to the ghatwal not included in the assets on

which the settlement with the Rajah was based, is a resumable allowance for keeping up a Police establishment is immaterial in this appeal. The lands were certainly not appropriated for the purpose of maintaining such establishment, for they were assessed for revenue. See the case of *Raja Lelanund Singh* vs. *The Government of Bengal*, in 6 Moore's Indian Appeals, page 101, where the character of ghatwali tenures generally is discussed.

It has been doubted whether the order of the Magistrate of the 22nd August 1816, directing the Rajah to appoint after the dismissal of Rup Singh, is evidence that the power of appointment was with the Rajah. The further proceedings of the Magistrate of the 30th March 1822, rescinding his earlier order of the 27th February 1822, and referring the parties (the ghatwal and his tabedars or subordinates) to the Civil Court; for the settlement of their disputes as to the division of the land seem to me to show that at that time the Magistrate looked upon the jageerdar as not subject to his control in the matter of the appropriation of the jageer lands, and this supports the view taken by myself in the former case and by Mr. Justice MARKBY, in the Court below, in whose judgment I entirely concur.

WHITE, *J.*:— WHITE, *J.*

The appellants before us are the plaintiffs in the Court below, and also the Government whom the plaintiff made what he calls a *pro formâ* defendant to his suit. The respondent (whom I shall call the Rajah) is the principal defendant in the Court below. The suit is brought by the plaintiff for the purpose of being confirmed in the possession of nine properties consisting of the whole of certain mouzahs and of certain shares in other mouzahs.

Two questions arise in this case: one whether the lands in suit, when they came into the possession of the plaintiff were liable to be sold in execution of a decree obtained by the Rajah against the deceased father of the plaintiff—the other question is whether the Rajah, by virtue of the alleged sale, has acquired a title to the mouzah in dispute under which he can oust the plaintiff.

The Court below has decided the first question in favor of the

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Judgment.

WHITE, J.

Rajah, but the second one against him, and consequently relieved the plaintiff against the cloud upon his title occasioned by the sale, and quieted him in the possession of the mouzahs.

The Judge says in paragraphs 41 and 42 of his judgment:—"I find that the interest is saleable for the purposes aforesaid, *i.e.*, in satisfaction of a decree for a debt due from the plaintiff or his predecessor to the defendant, provided it be sold subject to this burden of the performance of the jageer service by the purchaser after he has obtained appointment to these duties at the hands of the Magistrate or his representative police authorities, and installation on the land by the same authorities. Applying the principles adopted in this judgment and the finding on the several issues to the particular sale, which is the special subject of interest in the present suit, we find that that sale is bad in the following particulars, the first of which is, that the Rajah caused the tenure to be advertized for sale as if it were an ordinary estate to which no burden of a service lien were attached."

As regards the two questions raised in the case, I will first consider that which relates to the effect and operation of the sale, for if that question is determined in favor of the appellant, it is unnecessary to pronounce a decision upon the other question.

The sale is made under a decree which the Rajah had obtained on the 24th of July 1866, against the plaintiff's father and others, and which is to be found at p. 131 of the Paper Book. The decree awarded to the Rajah, as his costs of suit, Rs. 72-6-6, with interest at 12 per cent. till realization. After execution proceedings had been commenced for these costs and struck off several times, similar and further proceedings were instituted in 1874, which ultimately resulted in the disputed sale. The amount due under the decree had then swelled, with the costs of execution, to Rs. 228.

Now, what was sold under the decree? And what passed by the sale? The sale certified, which is the usual and primary evidence on these points, has not been produced by the Rajah, and these questions must be answered by a reference to the decree and the sale proclamation, which appear to be the only documents of title that have been put in evidence by the Rajah.

The terms of the decree have just been mentioned. In the sale proclamation, a document which iss ued on the 11th of June 1874, the present plaintiff is stated to be "the judgment-debtor," which, I presume, must be intended to mean that he represents his deceased father, the judgment-debtor; for, except in this sense, the sale cannot in any way be supported, as the decree is not against the present plaintiff, and therefore does not warrant execution being taken out against him personally. The proclamation then states that "the sale extends only to the right, title, and interest of the judgment-debtor;" and after enumerating the nine items of property, being the mouzahs in dispute, describes the subject of sale "as the right of the judgment-debtor to the amount of profits due to him, after deduction of Rs. 550-7 as annual rent on account of the mouzahs aforesaid."

As regards these mouzahs and their tenure, I think it is clear upon the evidence, first, that they were held by the plaintiff's father and are now held by the plaintiff subject not only to the payments of certain rent, but also to the rendering of certain services; secondly, that the rent is a reduced rent, because of the services which the holder is liable to render; thirdly, that the services are of a public nature and such as the Government has an interest in the performance of, and, that although, the rent is payable to the Rajah, the services are not of a private character or personal to the Rajah, or such as he can put an end to at his pleasure.

Independently of the evidence in the case on those points, the Rajah seems, as regards the nature of the services on which the mouzahs are held, to be concluded by the result of some previous litigation which took place between himself and the plaintiff's father. Several years ago, the Rajah brought a suit against the plaintiff's father to resume the Mouzahs in dispute, and recover *khas* possession, alleging that the services on which they were held were private and personal to himself, and had been dispensed with or had ceased to be performed. It was found by the two lower Courts that the services were not private or personal to the Rajah, but of a public nature. These decisions were affirmed by the High Court (see 6 W. R., 121,) and ultimately by the Privy Council (see 18 W. R., 321.)

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Judgment.

WHITE, J.

In dealing with the question as to what passed by the execution sale, it is immaterial to consider by whom those services are enforceable, whether directly by the Government or intermediately by the Rajah to whom the rent is payable: it is also immaterial upon the question now before me to consider whether the purchaser can enter into possession of the lands without being appointed by Government to perform the services.

The nature of the tenure by which the plaintiff holds, and his father before him held, the mouzahs being such as I have described, is that tenure effectually put up for sale by the proclamation to which I have referred?

The proclamation describes the tenure of the judgment-debtor as an ordinary rent-paying one, and ignores the important fact that it is a service tenure.

The misdescription of the holding is in a most material particular, and having regard to the unsuccessful attempt which the Rajah has made to resume the tenure, it is not too much to say that the tenure was wilfully misrepresented in the proclamation.

A purchase of the subject of sale as described in the proclamation did not, in my opinion, pass the tenure which the plaintiff has, or which his father had in the mouzahs in question.

The plaintiff, being still in possession of the mouzahs, and threatened with expulsion, may properly avail himself of the defect in the Rajah's title, founded on the misdescription of the subject of sale. He may, I think, justly say, that whatever the Rajah has bought, he has not bought the right of myself or my father to the tenure which I have or he had in the mouzahs.

The Government also, which is interested in the performance of the public services attached to the tenure, and whose presence on the record as a defendant has not been objected to by the Rajah, may properly oppose a sale which treats the plaintiff's tenure as a simply rent-paying one, and which, if held to pass the tenure, might be used hereafter as evidence that the tenure was discharged from the services to which it is undoubtedly subject.

It appears to me that the appeal may properly be disposed of on the point which I have mentioned, for both the plaintiff and

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the Government have in their respective pleadings objected in effect to the operation of the sale on the ground that the mouzahs were sold without declaring the jageer tenure or without specifying that they were service lands. And, moreover, the Court below has based its decree on the sufficiency of the objection.

Being of opinion that the lower Court was right in holding that the execution sale, which took place in 1874, conveyed no title to the Rajah under which he could turn the plaintiff out of possession, it is unnecessary to determine in this suit the other question, which has been raised, and which argued before us at great length, and as to which my brothers MARKBY and MITTER differed, viz., whether the interest of the plaintiff's deceased father in the mouzahs was such that, when they came into the possession of the plaintiff, they were assets of the father, and, as such, liable to be attached and sold for his debts.

I would allow this appeal, and confirm the decree of the First Court.

[CIVIL APPELLATE JURISDICTION.]

DINOMOYI DABIA CHOWDHRAIN AND ANOTHER (PLAINTIFFS) . . . . . } APPELLANTS;

AND

ANUNGO MOYI AND OTHERS (DEFENDANTS) . RESPONDENTS.

July 14th.

No. 1305 of 1876.

Ejectment—Res Judicata—Act X of 1877, section 13, Expl. II.

In a suit for rent and for ejectment, the defendant pleaded that his tenure was transferable and *istemrari*, and consequently protected by the Rent Law. In a former suit for arrears of previous years, in which the defendant pleaded that his tenure was *istemrari*, the plaintiff obtained a decree for ejectment on non-payment of rent within 15 days. In that case the defendant saved his tenure by payment within the time stated.

Held, that inasmuch as the defendant might in the former suit, in which the nature of the tenure was put in issue, have urged that his tenure was both transferable and *istemrari*, he could not in the present suit be allowed to alter his defence and rely upon the tenure being transferable.

Woomatara Debia vs. *Unnopoorna Dassee*, 11 B. L. R., P. C., 158, cited and followed. (Compare now Act X of 1877, section 13, Expl II.)

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Judgment.

APPEAL from a decision passed by the Officiating Judge of Zillah Rungpore, modifying the decree of the Subordinate Judge of that district.

Baboo *Ishur Chunder Chuckerbutty*, and Baboo *Lullit Chunder Sen*, for Appellants.

Baboo *Doorga Mohun Dass*, for Respondents.

The facts sufficiently appear from the following judgment of the Court (1), which was delivered by

PRINSEP, *J.* PRINSEP, *J.*:—

The plaintiff sues for rent of 1281, 1282 and 1283, and also for ejectment of the defendant under section 52 of the Rent Law. In special appeal it is necessary for us to consider only one point, viz., whether the plaintiff is entitled to obtain a decree for ejectment.

It appears that in a suit for arrears of rent of the previous three years the plaintiff obtained a decree for the arrears due and also for the ejectment of the defendant. The defendant in that suit pleaded that his tenure was *istemrari*, and that, consequently, he was not liable to be ejected. The Subordinate Judge, however, found that the *istemrari* character of the tenure was not established, and gave a decree for the rent claimed and for ejectment of the defendant on failure of payment within 15 days from the date of the decree. Thereupon the defendant paid the arrears due and saved his tenure. The plaintiff appellant in the present case contends that that decree is conclusive as between the parties regarding the nature of the tenure and the liability of the defendant to be ejected under section 52 of the Rent Act. The Subordinate Judge gave the plaintiff a decree in full, but on appeal the District Judge has given a modified decree, holding that the former decree is no bar to the defence now set up, and that as the tenure of the defendant is transferable by sale, he cannot be ejected therefrom save by its sale in execution of a decree.

It appears to us that the nature of this tenure was put in issue and determined in the former suit. The defendant set up only

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one plea in bar of ejectment, viz., that his tenure was an *istemrari* one, and failing to prove this, a decree was passed against him. He now raises the further plea that his tenure is both permanent and transferable, and that consequently under the terms of the Rent Law it is protected. The District Judge criticises the judgment of the Court in the former suit, and pronounces it to be based on a misconception of the law. Partly, apparently on this ground, and also because in his opinion the finding of the Court on the question of ejectment was not "a decision on the immediate and direct object of the suit before it," the suit being one for arrears of rent, and ejectment being merely "a question of procedure as to the mode in which the arrears should be realized," he holds that the former decision of the Subordinate Judge is no bar to the present defence.

We must, however, observe in the first place that the District Judge had no authority to question the correctness of the former decision. That decision had become final, and had been accepted without appeal by the defendant. For the purposes of this case it is sufficient to say that the plea which was raised by the defendant was fully considered and given against him. He cannot now be heard to resist the right of the plaintiff to eject him by setting up a defence of an entirely different character. If there was any force in the contention that his tenure is transferable as well as *istemrari*, he should have urged it in the former suit. As it is, he was content to rest his defence simply on the allegation that his tenure was *istemrari*, and having done so he cannot be allowed to take up this new ground of defence. This is the law as now set forth in the second explanation of the 13th section of the Code of Civil Procedure of 1877. It is true that that Code does not apply to the present case, but the law which it enacts is not new law. It has been enunciated in more than one case by the High Court, and it was laid down by Lord WESTBURY in the case reported in 11 B. L. R., p. 158,—*Woomatara Debia* vs. *Unnopoorna Dassee*.

But again we are unable to agree with the District Judge that the finding of the Subordinate Judge in the former suit was not essential to the decision of the case before him, and that the determination of this point amounts to no more than a

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determination on a question of procedure. By the terms of section 52 of Act VIII of 1869, "any person desiring to eject a ryot on account of non-payment of arrears of rent may sue for such ejectment and for recovery of the arrear in *the same action*." Consequently the right of the plaintiff to eject, and the determination of the question of arrear, constitute "the immediate subject of the decision." No doubt the question of the right to eject cannot be entered into until the existence of the arrear is established, but this in no way alters the double character of the suit, or renders it the less imperative on the Court when the plaintiff has proved the arrear and his right to eject to give a decree which shall embody both forms of relief. Here, the plaintiff having established the existence of the arrear, his right to eject opened up the question of the nature of the tenure held by the defendant. The latter alleged that its *istemrari* character saved him from ejectment. On this, issue was joined. It was a cardinal point in the case, and without its decision no right determination of the suit would have been arrived at. This being so, it seems clear to us that the decision, as a decision of a Court of competent jurisdiction, was conclusive and binding in all future proceedings between the parties.

An objection has been taken by the pleader for the respondent that the order of ejectment passed in the former suit was one of a provisional character only—that as it could not be enforced owing to the defendant making good the amount decreed, it cannot be binding in a subsequent suit. We cannot, however, subscribe to this view. The issue involving the right of the plaintiff to eject was fairly raised and determined, and it is not because the defendant escapes the full effect of the decree by making prompt payment that this right of the plaintiff ceases to be operative. The right remains having been established once and for all by a competent Court, and its exercise can only be averted by payment within the 15 days grace allowed by the Law.

We, therefore, set aside the order of the lower Appellate Court, and affirm that of the first Court. The appellant will get his costs in this Court, and also in the lower Appellate Court.

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judgment was set aside, and the case remanded for re-trial. On remand the plaintiff's suit was dismissed, and the order of dismissal was upheld by the lower Appellate Court. *Held*, on further appeal by the High Court, that the fact of the tenants not having joined in the submission to arbitration, did not vitiate the award, and that as between A and B the original decision of the Court of First Instance in terms of that award must be restored. BISHOKA DASIA *v.* ANUNTO LALL PANI 65

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Charter Act—*continued.*
brought against the defendants, and dismissed by the Moonsiff of B. The plaintiffs in each case appealed to the District Judge, who reversed the decision of the Moonsiff. In both Courts all 46 cases were disposed of in one judgment. Six of the cases being appealable, special appeals in such cases were preferred to the High Court, and pending such appeals, an application for a review of the remaining 40 cases was made to the District Judge, who ordered that the petition for review should stand over until the result of the special appeals should be known. The High Court having on special appeal restored the decision of the Moonsiff dismissing the suits, the application for review was renewed before the successor of the former District Judge. He refused to admit the application. *Held*, that the District Judge had not declined jurisdiction nor acted beyond his jurisdiction, and that theHigh Court had, therefore, no power under section 15 of the Charter Act to interfere. RAM LALL SINGH *v.* JANKI MAHATOON ... 14

Charter-party, Construction of—*Contract Act, section* 230, *cl.* 2—*Evidence Act, section* 92—*Agent, Personal liability of—Undisclosed Principal.*] Under a time Charter-party the plaintiffs chartered a certain vessel from the defendants who were described in the document as "H & Co., as Agents for, and on behalf of, the owners." The Charter-party, which was signed "H. and Co., Agents for the owners," provided that the ship should be provided "with a proper and sufficient crew of officers, seamen, stokers, engineers, firemen and other necessary persons for working cargo with all despatch;" and further that "the owners *or* Agents should be held responsible" for certain losses "which might arise to the goods or cargo from the state of the ship's stowage," or from any incapacity or negligence of the crew. The names of the owners of the vessel, though disclosed to the plaintiffs before the making of the Charter-party, did not appear in the document itself. In a suit by the plaintiffs against the defendants to recover a sum paid by them as they alleged, on behalf of the defendants, in providiffg stevedores for the loading and discharging cargo, it was *held* that under the contract the defendants were not bound to employ stevedores, and therefore not liable to pay the sum claimed. *Semble*, that clause 2 of section 230 of the Indian Contract Act must be read subject to the provisions of section 92 of the Evidence Act, so that an Agent who appears to be personally liable on the face of a document which does not disclose the name of his principal cannot escape liability by giving evidence of a disclosure, apart from the document, of his principal's name. SOOPROMONIAN SETTY *v.* F. W. HEILGERS 377

Collectorate Map. See EVIDENCE ACT, SECTION 83 577

Committal to Sessions Court—*Irregularity—Prejudging defence to charge committed to Sessions Court.*] Upon the single charge of wrongful confinement preferred under section 342 of the Indian Penal Code, before a Joint Magistrate, the prisoners raised a defence justifying the confinement on the ground that the persons confined had been caught by them under circumstances which led to the belief that they had committed house-breaking by night with intent to commit theft. Enquiry having been made, the Magistrate committed the prisoner not only for wrongful confinement, but, disbelieving the defence, for fabricating false evidence and for bringing a false charge. The prisoners were tried by the Sessions Judge and found guilty on all three charges at one and the same time. *Held*, that the conviction on the last two charges was illegal, as by adding the additional charges the Magistrate had really prejudged the defence to the first charge.

Where the Court, without having first heard the evidence for the prosecution, examines the witnesses for the defence, he commits an irregularity, but if the prisoners are not materially prejudiced thereby, the conviction will not be set aside. TURIBULLAH, *In the matter of* ... 338

Complainant, Right of, to be examined. See DISMISSAL OF COMPLAINT 134

Conduct of Parties. See CONTRACT, INADMISSIBILITY OF PAROL EVIDENCE TO VARY A WRITTEN 419

Confession unattested inadmissible. See CODE OF CRIMINAL PROCEDURE, (ACT X OF 1872) SECTIONS 122 AND 346 137

Consent, Risk of, Death taken by See INDIAN PENAL CODE, ACT XLV OF 1860, SECTION 300, EXCEP. 5 285

Consideration, Failure of—*Refund of Purchase Money—Covenant for quiet enjoyment.*] The plaintiffs who had been durputnidars of two villages belonging to a certain taluq which was sold for arrears of rent under Act VIII (B. C.) of 1869, and purchased by the defendants, took from the purchasers a fresh durputni lease of their former two villages, and of a third village, and for such lease paid Rs. 1,199. Subsequently, the sale of the taluq being set aside, the second lease was avoided, and the plaintiffs who were restored to their former position as durputnidars of the two villages, brought a suit for a return of the consideration money of the lease so avoided. *Held*, that the plaintiffs were entitled to recover. *Semble*, that putnis, durputnis, and se-putnis, although they may not be in strict analogy with leases in England, contain, in themselves, sufficient of the nature of such leases for the Court to allow to the grantee, in cases where it is otherwise equitable, that protection which a lessor in England is understood to grant his grantee for possession of the land. TARA CHAND BISWAS *v.* RAM GOBIND CHOWDHRY 20

Construction of Statute. See CONTRACT, INADMISSIBILITY OF PAROL EVIDENCE TO VARY A WRITTEN 419

Contemporaneous Oral Agreement. See EVIDENCE ACT, I OF 1872, SECTION 92.. 274

Contract Act, section 128. See HUNDI, LIABILITY OF ACCOMMODATION, ACCEPTOR OF 145

Contract Act, section 230, cl. 2. See CHARTER-PARTY, CONSTRUCTION OF 377

Contract, Inadmissibility of Parol Evidence to vary a written—*Conduct of Parties—Evidence Act, I of* 1872, *section* 92—*Statute, Construction of.*] The defendants, in answer to a suit by the plaintiffs for possession of certain lands, alleged that a registered kobala, which purported to transfer the lands to the plaintiffs, was intended by the parties to operate merely as a mortgage. *Held*, that they could not be allowed to adduce evidence furnished from the acts and conduct of the parties for the purpose of so varying or subtracting from the written contract. KASHI NATH CHATTERJEE *v.* CHUNDI CHURN BANERJEE, B. L. R., Full Bench, 383, considered to be over-ridden by section 92 of the Evidence Act. DAIMODDEE PAIK *v.* KAIM FARIDAR 419

Code of Criminal Procedure (Act X of 1872), sections 122 and 346—*Confession unattested inadmissible—Secondary evidence to prove unattested confession.*] A prisoner charged with murder confessed his guilt before the Magistrate, who recorded the confession under section 122 of the Code of Criminal Procedure, but omitted to append to the record the proper certificate, or obtain the attestation of the accused by his signature or mark, as required by section 346. The prisoner was finally committed to the Sessions Court for trial. *Held*, that the omissions could not be rectified under any authority contained in the last clause of section 346 by taking the evidence of the recording officer that the prisoner duly made the statement recorded, and that the confession was not admissible in evidence. REG. *v.* RAI RAITON, 10 Bom. H. C. R., 166, followed. THE EMPRESS *v.* MUNNOO PANIOLI 137

Court Fees, Effect of payment of pending enquiry into Pauperism. See PROCEDURE 331

Covenant for quiet enjoyment. See CONSIDERATION, FAILURE OF 20

Culpable Homicide. See INDIAN PENAL CODE, ACT XLV OF 1860, SECTION 300, EXCEP. 5... 285

Criminal Procedure Code (Act X of 1872) section 147—*Dismissal of complaint.*] A charge of theft was preferred by the petitioner on the 7th October 1878, before the Police, who thereupon instituted enquiries which subsequently resulted in their finding the charge unproved. Meanwhile, on the 15th October, the charge was repeated in a complaint before the Magistrate of the District, who directed the complainant and his witnesses to attend on a particular day, but subsequently, without having examined them or the complainant, referred the matter to the Sub-Deputy Magistrate. That officer having reported the charge to be false, the Magistrate, on the 9th November, wrote upon the Police Report, which had meanwhile, on the 26th October, been submitted to him, the following direction, viz., "shew as false" On the 19th November a counter-prosecution under sections 211, 182 and 500 of the Penal Code was sanctioned, and eventually on the 22nd May 1879, resulted in the petitioner being convicted. While the counter-prosecution was pending, the petitioner, on the 22nd April, applied to the Magistrate to proceed with his complaint according to law, but was informed that his complaint was dismissed. On the following day the Magistrate recorded the following order: "Dismissed in accordance with my decision recorded in the Police Report under section 147 of the Criminal Procedure Code." *Held*, that the complaint had been improperly dismissed, and that the order of the Magistrate, dated 23rd April 1879, must be set aside. SHEIKH ERAD ALI *v.* NUSIBUN NISSA BIBI 534

Criminal Procedure Code—*continued.*

sections 147 and 467—*Penal Code, sections* 211, 182, *and* 500—*Sanction to prosecute.*] A charge of theft was made before the Police, and while enquiries, which afterwards resulted in the charge being found by the Police not to be proved, were pending, the charge was repeated in a complaint before the Magistrate of the district, by whom the matter was handed over to the Sub-Deputy Magistrate, who reported the charge as false. Whereupon the Magistrate directed the Police to enter the charge as false, but without ordering the formal dismissal of the petition of the complainant. On the application of the accused, a counter-prosecution under sections 211, 182, and 500 of the Penal Code, was then sanctioned, and the case sent to the Deputy Magistrate for trial. That officer discharged the accused on the ground that the sanction of the Magistrate was illegal, as there had been, he alleged, (1) no judicial investigation as to the original charge; (2) no formal dismissal of the complaint; and (3) the witnesses produced by the complainant had not been all examined. *Held*, that the Deputy Magistrate was bound to accept the sanction made by a superior Court as valid, and to leave the accused to question it before a competent Court if so advised; that a prosecution may be maintained in respect of a false charge made to the Police, or contained in a complaint which has been dismissed under section 147 of the Criminal Procedure Code although there has been no judicial investigation, and that accordingly the Deputy Magistrate

Criminal Procedure Code—*continued.*
ought to have tried the charge before him. NUSSIBUNNISSA BIBEE *v.* SHEIKH ERAD ALI 413

——— **sections 233 Expl. and 263.** See ASSESSORS ... 405

——— **sections 328 and 491**—*Evidence recorded partly by one Magistrate, and partly by another.*] Notwithstanding the introduction into the section of the words "the accused person" and "conviction," the provisions of section 328 of the Criminal Procedure Code apply to an enquiry instituted under section 491, with a view to enforcing the giving of security against a breach of the peace, and in such a case where the Magistrate, by whom only part of the evidence has been taken, is succeeded by another Magistrate, while such enquiry is pending, the person called upon to show cause why he should not give security, may insist, before the latter, upon the recall and re-examination of the witnesses whose evidence has been already taken by the former Magistrate. BURODA KANT ROY *v.* KORIMUDDI MOONSHEE 452

——— **section 502.**
See RECOGNIZANCE, FORFEITURE OF ... 243

——— **section 518**—*Haut, Removal of, to a distance—Jurisdiction.*] Where a Magistrate made an order under section 518 of the Code of Criminal Procedure (Act X of 1872), directing one of two rival haut proprietors to remove his haut to such a distance as to render it useless for the purposes for which it was established, it was *held* that the order came within the purview of the Full Bench decision of GOPI MOHUN MOULIK *v.* TARAMONI CHOWDHRANI, 4 C. L. R., 309, and might be set aside as in excess of jurisdiction. SHURUT CHUNDER BANERJEA *v.* BAMA CHURN MOOKERJEA 410

——— **section 518**
See NUISANCE 305

——— **section 532**—*Dispute, Nature of—Jurisdiction of Magistrate—Declaratory Decree.*] To enable a Magistrate to interfere in any matter under section 532 of the Code of Criminal Procedure (Act X of 1872), there must be some substantial dispute in some way necessitating such interference. That section only enables the Magistrate to prevent arbitrary interruption, by any person, of rights actually enjoyed by the public or a person or class of persons; it does not enable him to make a purely declaratory decree. MAHARAJAH OF BURDWAN *v.* DARJEELING MUNICIPALITY 324

——— **section 530**—*Proceeding based upon insufficient materials—Jurisdiction.*] Where the proceeding recorded by a Magistrate, under section 530 of the Criminal Procedure Code, is based on materials which do not disclose sufficient ground for considering that a breach of the peace is imminent, an order calling upon the parties concerned in the dispute to attend in Court, and give in a written statement of their respective claims in respect of the fact of actual possession of the subject of dispute, may be set aside as made without jurisdiction. CHUNDER MADHUB GHOSE *v.* JUGGUT CHUNDER SEN 463

Damages, Measure of, for non-Delivery of goods under Contract of Sale—*Forbearance of buyer at seller's request.*] The defendants, by bought and sold notes, contracted in February 1877, to sell to the plaintiffs 200 tons of wheat, delivery under the contract to be given "during all April on 15 days' notice from the buyers." Notice was given on the 9th of April, but the defendants were unable to give delivery within the agreed time, and the plaintiffs, on the 11th May, instructed their attorneys to demand immediate payment of the difference between the contract price and the then market price, treating the contract as rescinded. Subsequently the defendants being prepared to give delivery of 350 bags, the plaintiffs agreed to take delivery without "prejudice to their right of claim against the sellers on account of the remaining 175 tons still undelivered." This and several other parcels, making altogether 113 out of the 200 tons, were delivered during the latter part of May, but on the 31st of May the plaintiffs refused to take further deliveries, alleging that the quality of the wheat offered was inferior, and brought a suit for damages for the non-delivery under the contract of the remaining 87 tons. *Held*, that there was no binding agreement on the part of the plaintiffs to give time for the fulfilment of the contract after April, but merely a forbearance on their part to pursue their rights, and that the plaintiffs were entitled to the full measure of damages. OGLE *v.* VANE, L. R., 2 Q. B., 275; and FREITH *v* BURR, L. R., 9 C. P., 208, cited and followed. S. S. GLADSTONE *v.* SEWBUX 106

Damages, Measure of—*Assessment of Damages, Mode of—Practice—Fresh Issues—Civil Procedure Code (Act X of 1877), section 566.*] In a suit for negligence, where it is possible for the Court to take one or more different views as to the proper measure of damages, the plaintiff must come prepared with evidence as to the amount of damages, according to whichever view the Court may adopt; and if the evidence produced is applicable to one view only, the Court is not bound to give the plaintiff a re-trial, and to allow him to remodel his case with fresh evidence under section 566 of the Civil Procedure Code. ANUNDO LALL DOSS *v.* BOYCAUNTRAM ROY 473

Declaratory Decree. See ACT VIII OF 1859, SECTION 15 270

Declaratory Decree. See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTION 532 324

——————— See EXECUTION OF DECREE 97

——————— See HINDU WIDOW, POWER OF, TO DISPOSE OF ACCUMULATIONS FROM HUSBAND'S ESTATE 511

Decree, Agreement Altering terms of. See EXECUTION OF DECREE... 29

——, **Copy of.** See PROCEDURE ... 387

—— **for Partition of Property Partly ascertained and Partly unascertained.** See EXECUTION OF DECREE 97

—— **for Possession.** See LIMITATION 55

—— **indirectly involving question of Title to Property of value of Rs. 10,000.** See APPEAL TO PRIVY COUNCIL 125

——, **Right to recover limited to specific property by.** See EXECUTION OF DECREE 11

——, **Sale in Execution of.** See ACT X OF 1877, SECTION 588 (W) 465

"Dena-Powna" Clause. See INJUNCTION TO RESTRAIN DECREE-HOLDER FROM EXECUTING DECREE 434

Description of place of abode of Plaintiff or Defendant. See SUIT TO SET ASIDE A DECREE OF HIGH COURT 366

Diluvion—*Re-formation of lands on old site—Onus of proof—Limitation—Adverse Possession.*] Where in a suit for possession of lands which have re-formed upon the old site after diluviation, the defendant relies upon a Statutory title of twelve years' possession, the plaintiff, in order to succeed, must, according to the rule laid down in the case of MAHARAJAH COOWAR NETRASUR, 8 M. I. A., 220, prove satisfactorily that the defendant has not been in possession for the period of twelve years next preceding the commencement of his suit. And, where the evidence is not sufficient to support an affirmative finding that the whole of the lands claimed have re-formed within twelve years preceding the institution of the suit, it is incumbent on the plaintiff to show specifically the portion, if any, which has not so re-formed. *Per* JACKSON, *J.*—I am unable myself to see on what principle or by what means the Court could, of itself, undertake to divide the portion of the land which may have re-formed within twelve years from the larger part which evidently re-formed more than twelve years ago, and had been in the adverse possession of the defendants. KOOMAR RUNJIT SINGH *v.* SCHOENE, KILBURN AND OTHERS 390

Discharge by one of Several Decree-Holders. See JOINT DECREE... ... 70

Discretion of Court. See EVIDENCE ACT, I OF 1872, SECTION 33 504

——————— See INTEREST ... 349

——————— See ISSUES, AMENDMENT OF 353

Dismissal of Complaint. See CRIMINAL PROCEDURE CODE, SECTION 147 ... 534

——————— *Prosecution under section* 211 *of Penal Code (Act XLV of* 1860) *—Right of complainant to be examined.*] A charge of burglary and theft having been preferred against two persons, the Magistrate, before whom the charge was laid, after comparing the petition of complaint with the papers submitted to him by the Police, who had made an enquiry and reported the charge to be false, directed, without having taken the examination of the complainant, that the case should be struck out, and that proceedings should be instituted against the complainant under section 182 of the Indian Penal Code. Proceedings were accordingly taken, and the complainant was ultimately tried and found guilty of an offence under section 211. *Held*, on appeal, that the proceedings had been irregular and should be quashed; that the Magistrate should be directed to re-open the enquiry into the charge of burglary and theft, first examining the complainant; and that, if after such examination he should be of opinion that the charge was false, the appellant might be proceeded against under section 211 of the Penal Code. BIYOGI BHAGUT, IN THE MATTER OF ... 134

Dispute, Nature of. See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTION 532 324

Distraint. See PRACTICE 32

Documents, Non-Registration of. See JURISDICTION 52

——— **partly testamentary, Construction of.** See PROBATE... ... 401

Ejectment, Right of. See FORFEITURE 469

——————— See RES-JUDICATA 599

Enhancement of Rent—*Apportionment of rent under Butwara Proceedings—Butwara—Act VIII (B.C.) of* 1869, *section* 17, *Meaning of "talug" under—Talug apportioned by Butwara.*] In answer to a suit for enhancement of rent by the plaintiff as owner of an undivided share in a certain zemindari, allotted to him under butwara proceedings more than 20 years previously, the defendants contended that the talug, the rent of which it was sought to enhance, had been held by them for upwards of 20 years at a fixed rent, and consequently, under section 17 of Act VIII (B C.) of 1869, was *prima facie* not liable to enhancement. It was found that in 1861, the owner of another undivided share, under the same butwara, had brought a suit for enhancement and obtained a decree. *Held*, that

Enhancement of Rent—*continued.*
the "taluq" intended by section 17 of Act VIII (B C.) of 1869 was the original taluq, and, therefore, the defendants, unless they could show that the rent of that taluq had remained unchanged, either in its original entirety, or apportioned, as it had been under the butwara, were not entitled to the benefit of that section. DURGA PERSHAD MYTI *v.* JOY NARAIN HAZRA, 2 C. L. R., 370, distinguished. SARUT SUNDARI DABIA *v.* ANUND MOHUN GHUTTUK 448

Equitable relief against Forfeiture. See FORFEITURE 469

——— **Rights of Mortgagee.** See MORTGAGE 150

European British Subject. See MUTINY ACT (41 VIC., CAP. 10) SECTION 101 ... 432

Evidence. See LIMITATION ACT, IX OF 1871, SECTION 20 361
——— See PRACTICE 164

Evidence Act, I of 1872, section 33.—"*Incapable of giving evidence*"—*Discretion of Court.*] The words "incapable of giving evidence" in section 33 of the Evidence Act, I of 1872, denote an incapacity of a permanent, not of a temporary kind; and where a witness is proved to be incapable of giving evidence, the Court has no discretion as to admitting his deposition. But, where the absence of a witness is casual or due to a temporary cause, the Court has such a discretion "if his presence cannot be obtained without an amount of delay or expense, which, under the circumstances, the Court considers unreasonable." PYARI LALL, IN THE MATTER OF 504

——— **section 32, clause 5**—*Relationship, Evidence of Family Priest as to*—"*Special Means of Knowledge.*"] Evidence of statements, made by a deceased family priest as to the relationship of the members of the family, may be given under section 32, clause 5 of the Evidence Act. SHAM LALL SINGH *v.* RADHA BIBEE 173

——— **section 83**—*Map made by the authority of Government*—*Collectorate Map.*] The plaintiff, in a suit for possession of certain lands which he claimed as belonging to a mouzah which he had purchased from the Government, produced in support of his claim a map of the mouzah made by the Collector in 1859, while the mouzah was in the khas possession of the Government: *Held*, that it was not a map purporting to have been made by the authority of Government, and could not, therefore, be presumed, under section 83 of the Evidence Act, to be accurate. SHEIKH ALLIJ HOSSEIN *v.* SHEIKH MUZHUR HOSSEIN ... 577

——— **section 92.** See CONTRACT, INADMISSIBILITY OF PAROL EVIDENCE TO VARY A WRITTEN ... 419

Evidence Act, I of 1872, proviso 2 and 3. See PAROL EVIDENCE, ADMISSION OF... 100

——— *Kistibundi Bond—Contemporaneous Oral Agreement—Payment, Plea of.*] In a suit upon a kistibundi bond the defendants pleaded that the debt had been liquidated from the usufruct of certain property which, by an oral agreement entered into at the time of the execution of the bond, had been assigned by them to the plaintiffs for that purpose. The assignment having been proved, the Court of First Instance, without further enquiry, dismissed the plaintiffs' suit. The District Judge, however, reversed the order of that Court, on the ground that under section 92, Act I of 1872, evidence of the alleged oral agreement was inadmissible, it being a contemporaneous agreement, varying and to some extent contradicting the terms of the kistibundi bond. On appeal it was *held*, that the allegation of the defendants amounted merely to a plea of payment, and that section 92 of the Evidence Act was not a bar to an inquiry as to the foundation of such a plea; and the case was accordingly remanded for an enquiry to be made as to whether the whole or any portion of the kistibundi money had been liquidated from the profits of the lands assigned. GOVIND PROSAD ROY CHOWDHRY *v.* ANUNDA CHUNDER CHOWDHRY 274

Evidence Act, section 92. See CHARTER-PARTY, CONSTRUCTION OF 377

Evidence recorded partly by one Magistrate and partly by another. See CRIMINAL PROCEDURE CODE (ACT X OF 1872), SECTIONS 329 AND 491 452

Execution of decree by transferree of original decree-holder—*Mortgage Decree, Execution of, by holder who has also purchased part of the mortgaged property.*] A decree having been obtained upon a mortgage, against two judgment-debtors—the joint owners of a certain mehal which was subject to the mortgage, and which was declared by the Court to be subject to the decree, in the event of default being made in payment of the mortgage money, the 8-anna share of one of the debtors was, before execution had been taken out, sold at auction under Act VIII (B.C.) of 1868 and purchased by the appellant. Subsequently the decree-holder having attempted to execute the decree against the share so purchased, the appellant, in order to protect the share which he had bought, purchased the decree himself and proceeded to execute it against the remaining share in the hands of the judgment-debtors. *Held*, that the appellant, as the transferree of the original decree-holder, was entitled to execute the decree personally against the judgment-debtors, and also, in the event of their making default in paying the amount due under the decree, to proceed against the

Execution of Decree by transferree—*contd.* share of the mehal still in their hands; and, further, that if by reason of it being necessary to sell the remaining share of the judgment-debtors any equity should arise between them and the appellant to have the decretal money distributed over the whole property mentioned by the decree, that equity must be enforced by an independent suit. NAFER CHUNDER MUNDUL *v.* BAIKANTO NATH ROY 156

Execution of Decree.—*Decree, Agreement altering terms of—Jurisdiction.*] On the day fixed for the sale of certain property in execution of a decree, the judgment-debtor agreed with his creditor that in consideration of his allowing proceedings to be stayed, he would, within six months, pay the amount then found due upon the decree, with interest at 24 per cent., a higher rate than was allowed by the decree. Upon the terms of this agreement proceedings were stayed. Default having been made, and the judgment-creditor having applied for fresh execution of the decree with interest at the higher rate, the judgment-debtor objected that it was not competent for the Court to issue execution for the higher rate of interest stipulated for by the parties, but that the Court was bound to adhere strictly to the terms of the decree. *Held*, that the judgment-debtor was estopped by his conduct from raising such objection. SADASIVA PILLAI *v.* RAMALINGA PILLAI, L. R., 2 Ind. App. 219, cited. SHEO GOLAM LALL *v.* BANI PROSAD 29

2———————*Decree for partition of property, partly ascertained and partly unascertained—Declaratory decree—Act X of* 1877, *sections* 211 *and* 212—*Act VIII of* 1859, *sections* 196 *and* 197.] In the course of a suit for declaration of right to property, and for partition, a compromise was entered into by which it was agreed that certain property already ascertained should be divided in certain proportions, and that certain other property, not yet ascertained should, on being ascertained, be partitioned on the same basis. The Court merely recorded the compromise, and declared that the decree should be according to terms therein set out. *Held*, that this decree could only be executed as to the property which had been ascertained as divisible, and that as to the other property the decree must be taken as declaratory only. The Court executing a decree is bound by the terms of the decree, and it is only in cases provided for by sections 211 and 212 of Act X of 1877, corresponding with sections 196 and 197 of Act VIII of 1859, that it is at liberty to determine the rights of the litigants in proceedings taken after decree. RAM LAPIT RAM *v.* CHOARAM 97

3———————*Investigation of claims—Act X of* 1877, *sections* 278, 279, 280]. In a suit upon a mortgage upon a house, one of the defendants alleged in his written statement that he had purchased the house at an auction sale in execution of a decree against his co-defendants, but that he had since sold and conveyed the same to A, who had been put into and had held possession from the time of the sale to her, and further that the mortgage was collusive. A was not made a party to the suit. The plaintiff obtained a decree and proceeded to execute it by attachment and sale of the house. A thereupon objected that the house was not liable to be attached and sold in execution of a decree in a suit to which she was not a party, and alleged that it had been purchased and held by her prior to the suit, and that the mortgage bond was fraudulent and collusive. The Moonsiff dismissed her petition, on the ground that she was bound by the decree, her vendor having been made a party to the suit. *Held*, that the Moonsiff was bound to have investigated her claim according to the provisions of sections 278—280 of Act X of 1877. MUSSAMUT JAMELA *v.* LUCHMUN PANDAY 74

4———————*Decree, Right to recover under, limited to specific property—Procedure.*] In a suit upon a bond under which certain lands were mortgaged, the decree ordered "that the amount claimed together with costs be caused to be paid by the defendants to the plaintiffs in this way,—that the property pledged under the bond be held bound by the decree, and that the decree be realised by the sale of the pledged property," no provision being made for realization from the other estate of the judgment-debtor in the event of the proceeds of the pledged property failing to satisfy the decree. *Held*, that under the circumstances it must be presumed that the Court meant to limit the right of the plaintiff to recover to the mortgaged property, and to that alone, and that the judgment-creditor could not, in execution of his decree, proceed against the other estate of the judgment-debtor. SOLANO, E., *v.* WILLIAM MORAN & Co. 11

Execution of decree obtained against former holder of Jageer tenure. See JAGEER TENURE, NATURE OF 583

Execution, Question relating to. See APPEAL 27

Execution of decree of Privy Council. See PROCEDURE 387

Execution of Joint-Decree. See JOINT-DECREE 70

Execution of Small Cause Court Decree. See SMALL CAUSE COURT, ACT IX OF 1850, SECTION 58 460

Execution Proceedings. See CIVIL PROCEDURE CODE, ACT X OF 1877, SECTIONS 244 AND 588 (j) 242

Execution Proceedings under Act X of 1877. See APPEAL 23

——— Sale under Act VIII (B.C.) of 1869. See GROWING CROPS ... 95

Executor, Security not required from. See ACT X OF 1865, SECTIONS 244 AND 256 498

Express Agreement. See SUIT FOR INCREASED RENT 278

Fixtures. See SMALL CAUSE COURT, ACT IX OF 1850, SECTION 58 460

Forbearance of buyer at seller's request. See DAMAGES, MEASURE OF, FOR NON-DELIVERY OF GOODS UNDER CONTRACT OF SALE 106

Forfeiture—*Ejectment, Right of—Act VIII (B.C.) of 1869—Equitable Relief against Forfeiture.*] A seputni was granted to B by A, who held a durputni containing the following conditions, viz., "I shall pay rent month by month: should I fail in that I shall pay interest on instalments overdue at 1 per cent. per month: I shall pay the rent in full by the close of every year: should I neglect to make the payments, you will, of your own authority, take over possession of the said durputni talook after the expiration of one month of the next succeeding year, and I shall have no complaint against your doing so." Upon non-payment of rent for the year 1281, a suit for khas possession of the lands was brought against A and B. The defendants claimed an equitable right to prevent forfeiture by paying all arrears according to the terms of the durputni, together with all costs. *Held*, that whether or not the provisions of the Rent Law actually applied to the case, the Court was bound by the analogy of that law to apply in favour of the defendants an equity similar to the equity there given, and accordingly a decree was passed that, if the defendants should pay the whole of the rent due up to date, with interest according to the conditions of the durputni, together with the costs in the High Court and Courts below, they should be relieved from the effect of the forfeiture. MOTHOORAMOHUN PAL CHOWDHRY v. RAM LALL BOSE 469

Formal Possession in Execution of Decree. See LIMITATION 55

Fresh Issues. See DAMAGES, MEASURE OF 473

Full Bench.—*Recognizance, Forfeiture of—Criminal Procedure Code, Act X of 1872, section 502.*] According to the fair construction of section 502 of the Code of Criminal Procedure, a Magistrate is not justified in forfeiting a recognizance to keep the peace under that section, unless the party charged with a breach of the peace has had an opportunity of cross-examining the witnesses upon whose evidence the rule to

Full Bench—*continued.*
show cause has been issued. EMPRESS v. NOBIN CHUNDER DUTT 243

2 ——— ——— *Minor—Natural Guardian, Sale by—Act XL of 1858, section 18, et seq.*] Where plaintiff claimed certain immoveable property as purchaser, under a kobala, executed by a Hindu widow as guardian of her minor son, *bonâ fide* for the benefit of such son, the widow not deriving powers from any appointment or certificate under Act XL of 1858, it was *held* that the plaintiff's title was good. All the sections of Act XL of 1858, from the 18th onwards, respecting powers, duties ond responsibilities, relate not to guardians generally, but to persons appointed, or to whom certificates have been granted under the provisions of the Act. There being no indication in any part of the Act, of any intention to alter or affect the provisions of Hindu or Mahomedan law as to guardians who do not avail themselves of the Act, guardians acting without certificates will be regulated by the ordinary Hindu, or other law applicable to the case. ABBASSI BEGUM v. RAJRUP KOOWER, 2 C. L. R., 249, over-ruled. RAM CHUNDER CHUCKERBUTTY v. BROJONATH MOZUMDAR 247

3 ——— ——— *Suit for Increased Rent—Express Agreement—Notice—Act VIII (B.C.) of 1869, section 14.*] Where lands are held under a pottah by the express terms of which rent is payable at certain rates upon the quantity of land that may be found on measurement, if, on measurement being made, it is ascertained that a larger area exists than that in respect of which rent has hitherto been paid under the pottah, the landlord is entitled to claim an increased rent in proportion to the larger area, without serving the tenant with notice under section 14 of Act VIII (B.C.) of 1869. NISTARINI DASI v. BONOMALI CHATTERJEE AND DINONATH BOSE v. BONOMALI CHATTERJEE 278

4. ——— ——— *Nuisance—Criminal Procedure Code, Act X of 1872, section 518—Power of Magistrate—Rival Hauts.*] A Magistrate has no power, under section 518 of Act X of 1872, to make an order prohibiting one of two rival proprietors of two different hauts, from holding for the future his haut on Tuesdays and Fridays, such an order being in the nature of a perpetual injunction and entirely beyond his jurisdiction. Where the plaintiff, after stating in his plaint that for many years he had held a haut on his own lands on Tuesdays nnd Fridays, alleged that the defendant had set up a rival haut on the same days and endeavoured to prevent people attending his haut, thereby creating a disturbance which led to the Magistrate passing an order under section 518 of Act X of 1872, prohibiting him (the plaintiff) for the future holding his haut on these days: *Held*, that assuming the facts to be true, the plaintiff was entitled

Full Bench—*continued.*
to a decree declaring that as against the defendant he had a right to hold his haut on Tuesdays and Fridays. GOPI MOHUN MOULIK *v.* TARAMONI CHOWDHRANI 309

Gift, Deed of. See PROBATE 401

General Clauses Act, I of 1868, section 6. See APPEAL FROM ORDER 18

Goods and Chattels. See SMALL CAUSE COURT, ACT IX OF 1850, SECTION 58... 460

Gorabundi Tenure, Nature of—*Transfer of Gorabundi Tenure—Onus of Proof.*] The *onus* lies upon a plaintiff claiming, in virtue of a purchase of the tenure from the former holder, to be entitled to possession of *gorabundi* lands, to prove that such lands are transferable. *Per curiam:* There are no decided cases, nor is there any evidence to show either that *gorabundi* rights are more extensive than rights of occupancy, or, if more extensive, extensive in this particular direction, that is to say, that they are transferable. MOHUNT CHUTTERBHUJ BHARTI *v.* JANKI PROSAD SINGH 298

Growing Crops—*Execution sale under Act VIII (B.C.) of* 1869.] Unless growing crops are excepted by the notification of sale, or there is any custom proved to the contrary, the purchaser at an auction sale, under Act VIII (B. C.) of 1869, is entitled to the crops growing on the lands purchased by him. OBATOOLAH SURDAR *v.* DWARKANATH MOITRO 95

Haut, Removal of, to a distance. See CRIMINAL PROCEDURE CODE (ACT X OF 1872) SECTION 518 410

Hindu Executors and Devisees, Powers of—*Notice—Purchaser from Hindu Executor, Position of—Act IX of* 1871, *section* 10, *and Schedule II, Articles* 115, 133 *and* 134.] In 1867, the plaintiffs, who were the executors under the will of A. G., having failed to obtain satisfaction of a decree obtained by them as such against the representatives of one A. D. in respect of a joint liability in connection with a Company of which A. G. and A. D. and others had been directors, filed a suit in 1872, for administration of A. D.'s estate, and were found to be creditors to the extent of Rs. 30,000, which sum, however, they failed to realize out of the estate. Subsequently it was discovered that certain properties, portion of the estate left by A. D., had been mortgaged to the defendant M., and were in his hands. The properties in question had been mortgaged under two deeds of mortgage executed in pursuance of a bond, dated 24th June 1863, by the executors of A. D., two of whom were also residuary devisees, and as such entitled to his estate subject to his debts and liabilities, to secure a loan of Rs. 1,00,000 taken from M. through his solicitor. The bond described the properties as the "absolute property of the executors or some or one of them." The first mortgage was executed on the 14th of July 1863, after payment of Rs. 95,000. The executors had transferred their business to M.'s solicitor on the 7th of July, but up to that time he had not been allowed to become possessed of any cause papers or documents which could have given him notice of any liabilities due from A. D.'s estate, and before that date Rs. 85,533 had already been advanced upon the bond. The second mortgage, which was executed on the 6th August of the same year, giving of further security for the whole Rs. 1,00,000 advanced, recited A. D.'s liability in respect of the will of his father and the will of his brother, but made no mention of the plaintiff's claim. In 1868, the defendant M. foreclosed his mortgages. The plaintiffs filed this suit on the 23rd November 1876, as supplemental to the administration suit of 1872, on behalf of all the creditors of A. D.'s estate, claiming a right to follow the property in M.'s hands, and to have the same duly administered on the ground, first, of the express notice given to M.'s solicitor in the second mortgage that A. D's estate was still liable in respect of certain claims connected with the estates of his father and brother which ought, it was alleged, to have put him on further enquiry; and, secondly, of the constructive notice of M. through his solicitor who acted as solicitor of both parties in the mortgage transaction. *Held*, by PONTIFEX, *J.*, that although neither in the case of the heir nor of the devisee of a Hindu, has there been a distinct statutory provision as in England that lands may be followed in the hands of a purchaser, unless he is a *bonâ fide* alienee, the question as to how far lands purchased from a Hindu heir or devisee are liable in the hands of the purchaser of the testator's estate stands on the same ground as a similar question under the present English Law, according to which property, *bonâ fide* alienated before action brought, can be followed into the possession of a purchaser from the heir or devisee, if it can be proved that the purchaser knew (1) that there were debts of the ancestor or testator left unsatisfied; and (2) that their heir or devisee, to whom he paid his purchase-money, intended to apply it otherwise than in payment of such debts. Also, that for a purchaser to be affected with constructive notice through his solicitor, the latter must have actual notice, and that the plaintiffs, on whom the burden of proof lay, had failed to prove that at the time the Rs. 95,000 was advanced, the defendant's solicitor had actual notice of the liabilities of A. D.'s estate, or that M. or his solicitor had notice of any intended misapplication by the executors of the money advanced. CORSER *v.* CARTWRIGHT, L. R., 7 E. & I., 731, cited. On appeal *held*, that the suit was barred by limitation, as having been brought more than 12 years after the date of the mortgages, 12 years being the period of limitation applicable to the case under section 118 of Act

Hindu Executors, &c.—*continued.*

Hindu Executors, &c.—*continued.*
IX of 1871. *Per* GARTH, *C.J.*:—The words "in trust for a specific purpose" in section 10 of Act IX of 1871 are intended to apply to trusts created for some defined or particular purpose or object as distinguished from trusts of a general nature, such as the law imposes upon executors who hold recognised fiduciary relations. KHERODMONEY DOSSEE *v.* DOORGAMONEY DOSSEE, 3 C. L. R., 315, cited and followed; LALLABHAI *v.* MANUMVARBAI, I. L. R., 2 Bom., 389, distinguished. GREENDER CHUNDER GHOSE *v.* A. B. MACKINTOSH 193

Hindu Law—*Adoption—Sapindas—Inheritance Ex-parte Maternâ.*] A, who had a son, B, by his wife C, during the lifetime of his son executed an *unoomuttee puttro* in favour of C, empowering her to adopt a son in the event of the death of B. B, on coming of age, succeeded to the ancestral and other estate of his father who had died. Subsequently B. died childless, and his widow succeeded as heir to her deceased husband. C afterwards exercised the power of adoption from her husband and adopted D. *Held*, that although as heir to A, D could not displace the widow and full heir of B, and that although as heir to B he came after B's widow and mother, D might succeed when on their deaths he united in himself the capacities of heir to A and heir to B.

The rights of an adopted son, unless contracted by express texts, are in every respect similar to those of a natural born son. An adopted son takes by inheritance from the relatives, on the maternal side, of his adoptive father in the same manner as a son begotten would take. There is no difference as regards sapinda relationship between the adopted and the natural born son. JOY KISHORE CHOWDHRY *v.* PANCHOO BABOO 538

2.———*Impartible Raj—Alienation by Father.*] Although maintenance grants, conferred by the possessors of impartible Raje in Chota Nagpur, cease with the life of the grantor, and are resumable at the pleasure of the succeeding Rajah, the effect of the impartibility of such estates does not interfere with the ordinary law as to rights over property beyond making the Raj pass to the eldest son, subject to certain obligations imposed upon him of allowing maintenance to the junior members of his family. ANUND LALL SINGH DEO *v.* MAHARAJA DHERAJ GURROOD NARAYAN DEO, 5 M. I. A., 82, discussed. JUDAB LALL ADDITO DEB *v.* RAJAH WOODOY ADITTA DEB 181

Hindu Widow, Power of, to dispose of Accumulations of Profits from Husband's Estate—*Accumulations, Property acquired by Hindu Widow from—Hindu Wills Act—Declaratory Decree.*] A Hindu died in 1858, leaving two widows and a daughter. By a deed, dated 21st December 1873, his widows conveyed absolutely to the daughter certain property set out in three schedules: the first comprising property described as left by their husband; the second, property acquired by them by purchase from accumulations of the profits of his estate; and the third, property of both descriptions. The daughter having died, leaving a minor daughter, a suit was subsequently brought by the reversionary heirs of the deceased father, against the widows and the infant grand-daughter for a declaration that the deed did not and could not at any time affect their reversionary interest. *Held*, that inasmuch no immediate relief could be granted, it was unnecessary under the circumstances to make a declaratory decree. The Court will not in a declaratory suit decide intricate questions of law when no immediate effect and possibly no future effect can be given to its decision, and when the postponement of the decision to the time when there may be before the Court some person entitled to immediate relief (if the decision is in favour of the plaintiff) will not prejudice his rights in any way. *Semble.*—A suit so far as it is brought to set aside such an alienation by Hindu widows of property acquired from accumulations of the profits of the life estate of Hindu widows will not lie. *Quære.*—Whatever the law may have been formerly, whether having regard to the Hindu Wills Act, that Act does not enable a Hindu widow by will to dispose of all accumulations from the estate in her hands. MUSSAMUT HUNSBUTTI KOERAIN *v.* ISHRI DUT KOER 511

Hindu Wills Act. See HINDU WIDOW, POWER OF, TO DISPOSE OF ACCUMULATIONS OF PROFITS FROM HUSBAND'S ESTATE 511

Hundi, Liability of Accommodation Acceptor of—*Surety—Contract Act, section* 128.] In a suit against the acceptor of a Hundi, the defendant contended that, as he had accepted the Hundi for the accommodation only of a third person, he was liable only as surety, and the plaintiff, therefore, could not proceed against him until he had exhausted all his remedies against the principal. *Held*, that the liability of a surety being under the Indian Contract Act co-extensive, unless there is some contrary agreement with that of his principal, it was not necessary for the plaintiff to have first exhausted his remedy against the principal. TOTAKAT SHANGUNNI THENON *v.* KURSUNGAL KAKU VARID, 4 Mad. H. C., 190; LUCHHMAN JOHARIMAL *v.* BAPU KHANDU, 6 Bomb. H. C., 241, cited. J. C. PANIOTY *v.* DWARKA MOHUN DASS 145

Illegal Order. See INJUNCTION TO RESTRAIN DECREE-HOLDER FROM EXECUTING DECREE 434

Illegitimate Child—*Maintenance.*] Where a suit was brought against a Hindu by a woman who was a Mahomedan and the wife of a Maho-

Illegitimate Child—*continued.*
medan, for maintenance of her illegitimate child of which she alleged the defendant to be the father, it was held that such a suit would not lie. ADDOYTO CHUNDER DASS v. WOOJAN BEEBEE 154

Impartible Raj. See HINDU LAW ... 181

Inheritance Exparte Materna. See HINDU LAW 538

Injunction to restrain Decree-holder from executing decree—*Suit to set aside order—Illegal order—Limitation Act, IX of* 1871, *Schedule II, Art.* 15—"*Denapowna*" *clause.*] In 1861, A mortgaged an indigo concern to plaintiff, who afterwards entered into possession as mortgagee. While plaintiff was in possession, a putni included in the mortgage was brought to sale, and sold for arrears of rent under the provisions of Regulation VIII of 1819. As a consequence of this sale, the durputni of C in this talook was cancelled, and in 1867, C brought an action for damages against the executors of A, and obtained a decree. In 1869 the executors of A sold the equity of redemption in the concern, by a deed of sale, containing a *denapowna* clause, to plaintiff, and subsequently on the 21st June 1871, on C's application, plaintiff's name was, without objection on his part, substituted on the record as the representative of the judgment-debtor. Plaintiff afterwards applied under section 15 of the Charter Act to have the order set aside, but his application was refused. *Held*, in a subsequent suit for a declaration that the order of 21st June 1871 was illegal, and for an injunction restraining C from taking proceedings under the decree: that although that order could not be set aside in that suit, plaintiff was entitled to have C restrained by a perpetual injunction from taking any further proceedings. *Held*, also, that the fact of the plaintiff's not having appeared to oppose the substitution of his name on the record as representative of the judgment-debtor, did not disentitle him to be relieved from the effect of the order in question, the Court having had no power to make such order. DHURONIDHUR SEN v. AGRA BANK, LD. 434

Indian Penal Code, Act XLV of 1860, section 300, Except. 5—*Culpable Homicide—Consent, Risk of Death taken by.*] Where a person, knowing that there is a likelihood of his being killed, deliberately engages with others in a fight with deadly weapons and is killed, he cannot be said to have "taken the risk of death with his own consent" within the meaning of exception 5 of section 300 of the Indian Penal Code, and the persons taking part in the fight are liable to be tried under sections 149 and 302 of that Code for murder. *Per* AINSLIE, *J.*:—The 5th exception to section 300 of the Indian Penal Code applies to cases where a man consents to submit to the doing of some particular act, either knowing that it will certainly cause death, or that death will be likely to be the result. EMPRESS v. ROHIMUDDIN 285

Indian Penal Code—*continued.*
——— **sections 304, 304 *A.*]** Where the accused, a snake-charmer, exhibited a recently captured venomous snake, a cobra, without having extracted the poison, and in doing so placed it upon the head of a boy who took fright, and was bitten in the hand, and died shortly after from the effects of the bite, *held*, that the accused was punishable, not under section 304 A., for causing death by a rash or negligent act, but under section 304 of the Penal Code, as having done an act, which had resulted in death, with the knowledge that it was likely to cause death, but without any intention to cause death. The EMPRESS v. GONESH DOOBEY 580

Interest.—*Arrears of Rent—Act VIII (B.C.) of* 1869, *section* 21—*Discretion of Court as to interest.*] The omission to claim interest on arrears of rent, in past years, is not to be considered a waiver of the right to claim interest for all time. *Per* JACKSON, *J.*—The rule of law being that the instalments of unpaid rent *shall* be liable to interest at 12 per cent. (section 21 of Act VIII (B.C.) of 1869,) the discretion of the Court to allow interest or not upon over-due arrears of rent must be exercised upon very clear grounds. DINDOYAL PORAMANICK v. PRANKISHEN PAUL CHOWDHRY, Marsh., 394, distinguished. JOHOORY LALL v. BULLUB LALL BABOO 349

——— See MESNE PROFITS, CALCULATION OF... 60

Interrogatories. See PRACTICE... ... 164

Intervenor—*Suit for arrears of rent by person claiming to be landlord.*] In a suit for arrears of rent brought by a person claiming to be landlord, a third person ought not to be allowed to intervene, and by setting up a superior claim to the landlord's title to raise as between himself and the original plaintiff an entirely distinct question between new parties. PROTAP CHUNDER ROY CHOWDHRY v. JOGENDRO CHUNDER GHOSE 168

Investigations of Claims. See EXECUTION OF DECREE 74

Irregularity. See COMMITTAL TO SESSIONS COURT 338

——— **in Execution Sale under Act X of 1877.** See APPEAL 23

Issues, Amendment of—*Additional issues—Pleadings, Adding issues not strictly arising upon—Discretion of Court—Act VIII of* 1859, *section* 141—*Act X of* 1877, *section* 149.] Unless a Judge can see that an issue, proposed to be added or amended under section 141 of Act VIII of 1859, (corresponding with section 149

Issues, Amendment of—*continued.*
of Act X of 1877), will raise some point which is disclosed by the pleadings of the plaintiff on the one hand, or of the defendant on the other, he is clearly not bound under the obligatory words of the latter part of the section to allow the amendment. *Semble*—The Court has a discretion to allow issues to be framed which do not strictly arise upon matter within the scope of the pleadings, but in the exercise of that discretion the Court should consider all the surrounding circumstances. BIJJIB BIBI *v.* MONOHUR DOSS, 2 Ind. Jur., N. S., 118; WILKIN *v.* REED, 15 C. B., 192; LUCAS *v* TARLETON, 3 H. & N., 116, cited and followed. NEHORA ROY *v.* RAJAH RADHA PURSHAD SINGH ... 353

Jageer Tenure, Nature of—*Execution of decree obtained against former holder of Jageer Tenure—Service Tenures.*] Plaintiff's father, who was the jageerdar of certain mouzahs, died, while proceedings in execution of a decree obtained against him by the defendant, who was the zemindar, were pending. The jageer in question was held subject either to appointment or approval, the holder being bound to perform certain duties of a public nature. The proceedings were revived against the plaintiff as his father's representative, and three villages comprised in the jageer, and in the possession of the plaintiff as jageerdar, were attached and sold, the tenure being described in the proclamation as an ordinary rent-paying tenure, and the defendant became the purchaser. The plaintiff objected to the attachment and sale, but his objection was over-ruled. In a suit by the plaintiff, who admittedly held as jageerdar, for confirmation of possession of the property attached, *held*, (AINSLIE, *J.*, *dissentiente*, reversing the decision of MARKBY, *J.*,) that the attachment was not warranted by law, the tenure not being heritable, and that the plaintiff was entitled to retain possession notwithstanding the sale. *Per* JACKSON, *J.*—(*Officiating C.J.*)—The restrictions on the tenure appear conclusively to show that the plaintiff did not hold the mouzahs as property of the deceased judgment-debtor which had come into his possession, but that he held them as a quasi-public servant in precisely the same tenure as his father had held them, and that the father's interest was strictly limited to his own life and performance of the functions. The restrictions appear sufficient to deprive the jageer of the character of simply heritable property. *Per* AINSLIE, *J.*—In the absence of any special law upon the subject the zemindar has the same means of enforcing his demands against the sub-tenant as any other zemindar, and he may, therefore, sell the tenure for arrears of rent, and the fact that the tenant for the time being may be bound to render certain public services cannot interfere with his right to resort to sale for the recovery of his rents. * * * * * * It seems also that

Jageer Tenure, Nature of—*continued.*
the tenure is equally saleable for the debts of the holder. *Per* WHITE, *J.*—A purchase of the subject of sale, as described in the proclamation, did not pass the tenure which the plaintiff had, or which his father had, in the mouzahs in question. BUKRONATH SING *v.* RAJAH NILMONI SING 583

Joinder of Parties. See MULTIFARIOUSNESS 455

Joinder of Widows. See PARTIES ... 161

Joint Decree—*Discharge by one of several joint decree-holders—Execution of joint Decree—Act VIII of* 1859, *section* 207—*Act X of* 1877, *section* 231]. The representatives of one of several decree-holders conveyed his interest in the decree to A. Some time afterwards A filed a petition in Court, stating that the decree had been satisfied out of Court, and the case was thereupon struck out as far as he was concerned. Subsequently the other decree-holders applied for execution of their share of the decree, but it was objected that the decree had already been satisfied by payment to A. *Held*, that the other decree-holders were entitled to proceed with execution for the amount of their share, a joint decree-holder having no power to give a discharge out of Court to a judgment-debtor for more than his own share in the decree. MUSSAMUT BIBEE BUDHUN *v.* MUSSAMUT HAFEZAH 70

Joint Family (Mitakshara). See MINOR 398

Joint Hindu Family (Mitakshara)—*Suit for Partition—Admission of disruption of Unity of Family—Onus of proof—Partial Partition.*] Plaintiff, who was the adopted son of the third of three brothers, who, until about 1843, when the second seceded, formed a joint Hindu family, governed by Mitakshara law, sued as heir of his adoptive father, the defendants, who represented the eldest brother, and in whose hands the family property had remained, for an 8-anna share of the ancestral property. He alleged that his adoptive father had never separated from the joint family, and that, until 18th Joishto 1282, he had, as heir of his adoptive father, remained joint in estate and food with the elder branch of the family. The defendants denied this allegation, stating that the plaintiff and his adoptive father had seceded from the joint family, at the same time as the second of the three original brothers. *Held*, that the fact of a separation of the family having been admitted to have taken place many years ago, and of the family property having been allowed to remain in the hands of the defendants, threw the *onus* upon the plaintiff to give some *primâ facie* proof of the right which he claimed, the presumption of the continued unity of the joint family not arising where admittedly a disruption of that union had taken place. *Quære.*—Whether by Hindu law a partial partition of family property can take

Joint Hindu Family—*continued.*
place except by arrangement. CHOWDHRY RADHA CHURN DASS *v.* CHOWDHRY KRIPA SINDHU DASS 428

Jurisdiction—*Document, Non-Registration of —Variance*] A suit was brought, alleging that in a certain deed of compromise entered into, in another suit, between the plaintiff and the present defendants, the names of two of these dedefendants had been fraudulently and collusively entered as having a share in certain immoveable property, the subject in dispute, and praying for a declaration that these two defendants were not really entitled to any interest in the property under the compromise. The plaintiff failed to prove the allegations of fraud and collusion, and the suit was dismissed as showing no cause of action. On appeal, the Judge in the lower Appellate Court was also of opinion that the plaintiff's suit could not be entertained, but, an objection having been there taken that the deed of compromise was unregistered, decided upon that objection that by reason of such non-registration the document was invalid, and that upon this ground the plaintiff was entitled to a declaration that the two defendants whose names were alleged to have been wrongfully entered, took no rights to virtue of the compromise. *Held*, that the appeal ought to have been dismissed by the lower Appellate Court, it not being competent for the Judge to have taken cognizance of the objection as to non-registration where the document was not set up as a ground of title MADHUB ALI KHAN *v.* HOSSEIN REZA KHAN... 52

2.———*Partition—Suit for partition of lands excluded by Collector in former partition.*] On partition of a certain mehal, lands belonging thereto were excluded by the Collector. It being afterwards satisfactorily found that such lands really belonged to the mehal, and ought not to have been so excluded, it was *held* that a suit would lie in a Civil Court for partition of the excluded lands on the basis of the former partition. SREE MISSER *v.* CROWDY, 15 W. R., 243, distinguished. KRISHNO KUMAR BAISAK *v.* BHIM LALL BAISAK 38

———See RES JUDICATA 1

———See SMALL CAUSE COURTS ... 291

———See SPECIAL APPEAL 491

———See VALUATION OF SUIT ... 417

———See CHARTER ACT, SECTION 15 14

———See CRIMINAL PROCEDURE CODE (ACT X OF 1872) SECTION 518 410

———See CRIMINAL PROCEDURE CODE (ACT X OF 1872) SECTION 530 ... 483

———See EXECUTION OF DECREE ... 29

———**of District Judge.** See ACT X OF 1865, SECTIONS 244 AND 256 ... 498

Jurisdiction of Magistrate. See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTION 532 324

Kabuliat. See PAROL EVIDENCE, ADMISSION OF 100

Kistibundi Bond. See EVIDENCE ACT, I OF 1872, SECTION 92 274

Leave to mother of minor to bring suit for partition. See MINOR 398

———**to sue where necessary.** See SUIT TO SET ASIDE A DECREE OF HIGH COURT ... 366

Letters of Administration limited to particular Property whether granted. See ADMINISTRATION, GRANT OF LETTERS OF, TO HINDUS 290

Letters Patent, Cl. 11. See SUIT TO SET ASIDE A DECREE OF HIGH COURT 366

———**IX of 1871, Sch. II, Art. 15.** See INJUNCTION TO RESTRAIN DECREE-HOLDER FROM EXECUTING DECREE ... 434

Limitation—*Decree for Possession—Formal Possession in execution of Decree,*] Where a decree for possession is executed and possession delivered to the plaintiff by the Court in the usual way, whether actual possession is obtained thereby or not, the defendant cannot rely thereafter upon a plea of limitation based upon his wrongful possession previous to the execution. MOONSHEE JOWHUR ALI *v.* BABOO RAM CHAND, 24 W. R., 419, dissented from. UMRICA CHURN GOOPTO *v.* BHOLANATH GHOSAL ... 55

2.———*Promissory Note—Payable on demand—Act IX of* 1871, *Schedule II, Art.* 72—*Act XV of* 1877, *section* 2 *and Schedule II, Art.* 73.] Section 2 of Act XV of 1877 allows a plaintiff two years from the 1st October 1877, to bring his suit in cases where the period of limitation prescribed by that Act is shorter than the period prescribed by Act IX of 1871, but that allowance is not to be made where the period prescribed by the latter Act would expire before the completion of two years from the 1st of October 1877. OMIRTOLALL DEY *v.* HOWELL, 2 C. L. R., 426, cited and distinguished. ADMINISTRATOR-GENERAL OF BENGAL *v.* KEDAR NAUTH MOITRY 102

3.———*Surety on bond undertaking to pay Eventually—"Shesh projunto"—Act XV of* 1877, *Sch. II, Art.* 65.] A, verbally became surety upon a bond executed by B for repayment in May 1872 to the plaintiff, of certain advances, promising "if B does not pay eventually (*'shesh projunto'*) I will." Default was made, and in April 1878 the plaintiff filed a suit against both A and B, the suit being clearly barred as against the latter. *Held*, that the words "*shesh projunto*" could not be taken as limited to the time specified in the bond, and

Limitation—*continued.*
that the lower Court, in order to determine whether the suit was barred against A, must find upon the evidence when a demand was made upon him for payment, and then apply Art. 65 of Act XV of 1877, Sch. II. BESHUMBER DEY PODDAR *v.* HUNGSHESHUR MOOKERJEE 34

——— See DILUVION 390

——— See SALE FOR ARREARS OF RENT [371

——— See ACT VIII (B.C.) of 1865 6

———Act, IX of 1871, section 20—*Acknowledgment of debt in an unregistered document—Evidence—Alteration in document.*] The defendant on the 11th April 1875 entered into an agreement to pay off a debt due upon a registered bond, dated February 3rd, 1865, by a sale under a kobala of certain property. The kobala contained a clear acknowledgment of the debt, but on its being presented for registration, it was found that the original date, which was admitted by defendant, had been altered to the 11th August, and that the document, on that account, could not be registered. The transaction having fallen through for want of registration, the plaintiff sued upon the bond. The defendant pleaded the debt was barred as having been brought more than six years after the date of the bond. *Held*, that the document, although inadmissible in evidence in respect of the property covered by it, was admissible as evidence of an acknowledgment on the 11th April 1875 of the debt to the plaintiff, and that under Act IX of 1871, section 20, the suit was not barred by limitation. NUNDO KISHORE LALL *v.* MUSST. RAM SOOKHA KOOER 361

———XV of 1877, Sch. II, Arts. 171 and 178. See ABATEMENT OF SUIT ON DEATH OF SOLE PLAINTIFF 374

Magistrate, Jurisdiction of. See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTION 532 324

Maintenance. See ILLEGITIMATE CHILD 154

Map made by authority of Government. See EVIDENCE ACT, SECTION 83 ... 577

Market Value of Subject Matter of Suit. See VALUATION OF SUIT 417

Mesne profits, Calculation of—*Interest*] A decree-holder who had been wrongfully kept out of possession from a portion of certain lands belonging to him, brought a claim for wasilat for the time during which he had been so wrongfully kept out of possession. *Held*, that in calculating such wasilat, the Court ought to have ascertained by comparison with the amounts actually received from the portion of the lands which remained in the decree-holder's possession, what he would have realized had the arrangement prevailing at the time of dispossession subsisted all along, and upon that, and not upon what the party in wrongful possession did really realize, or might by good management have realized, to have estimated the wasilat. *Held*, also, that interest may be allowed upon the amount of wasilat found due. HURRO PERSHAD ROY *v.* SHAMA PERSHAD ROY, 1 L. R., 3 Cal., 654, and 1 C. L. R., 499; and RODGER *v.* THE COMPTOIR D'ESCOMPTE DE PARIS, L. R., 3 P. C., 465, followed. BABOO LUCKY NARAIN ROY CHOWDHRY *v.* KALLY PUDDO BANNERJEA 60

Minor—*Joint family, (Mitakshara)—Act XL of 1858—Act XXVII of 1860—Certificate to collect debts—Act X of 1877, Chap. XXXI.—Leave to mother to bring suit for Partition.*] The interest of a minor brother in an undivided joint Hindu family governed by Mitakshara law, is not such property as is capable of being taken charge of under a certificate of administration granted under Act XL of 1858. To enable the mother of such a minor to bring a suit for partition on his behalf, it is not necessary for her to be furnished with a certificate under that Act, nor is it necessary for her to obtain the permission of the Court under Chap. XXXI of the Code of Civil Procedure (Act X of 1877.) The eldest son, not being a minor, is the proper person to collect the debts due to the deceased father. SHEO NUNDUN SING *v.* MUSSAMUT GHUNSAM KOERER, 21 W. R., 143; and MUSSAMUT AJHOLA KOERER *v.* BABOO DIGUMBER SING, 23 W. R., 208, cited and followed. MUSSAMUT ETWARI *v.* RAM NARAYAN RAM, 4 B. L. R., 171, distinguished. MUSSAMUT GOURAH KOOER *v.* GUNGADHUR PURSHAD ... 398

2.——— *Natural Guardian, Sale by—Act XL of 1858, sections 18, et seq.*] Where plaintiff claimed certain immoveable property as purchaser, under a kobala, executed by a Hindu widow as guardian of her minor son, *bonâ fide* for the benefit of such son, the widow not deriving powers from any appointment or certificate under Act XL of 1858, it was *held* that the plaintiff's title was good. All the sections of Act XL of 1858, from the 18th onwards, respecting powers, duties and responsibilities, relate not to guardians generally, but to persons appointed, or to whom certificates have been granted under the provisions of the Act. There being no indication in any part of the Act of any intention to alter or affect the provisions of Hindu or Mahomedan law as to guardians who do not avail themselves of the Act, guardians acting without certificates will be regulated by the ordinary Hindu or other law applicable to the case. ABBASSI BEGUM *v.* RAJRUP KOWER, 2 C. L. R., 249, overruled. RAM CHUNDER CHUCKERBUTTY *v.* BROJO NATH MOZUMDAR 247

Mitakshara Joint Estate—*Sale of deceased father's Share—Rights of Purchaser—Notice.*]

Mitakshara Joint Estate - *continued.*
A, a Hindu governed by the Mitakshara Law, having two sons born in 1862 and 1869, respectively, in consideration of a loan, mortgaged joint ancestral property, consisting of an eight-anna share of a certain mouzah to B, by a deed of mortgage, dated 21st January 1870. In 1872 B obtained a decree upon the mortgage for principal, interest, and costs, and in execution of this decree proceedings were instituted and the eight-anna share in the mouzah attached. After several adjournments the sale of the attached property was fixed for the 23rd May 1873, but on the 19th of the same month A died. The proceedings were thereupon revived against A's heirs, his infant sons, and a sale was finally fixed for the 28th July 1873. Meanwhile on the 14th July, the mother and guardian of the infants filed a petition objecting to the sale and praying for the protection of the interests of her sons as co-sharers with their late father in the property. The petition was dismissed, and an order passed thereon directing that the proper remedy was by regular suit. The sale was accordingly held, and an eight-anna share of the judgment-debtor in the mouzah was sold and purchased by the respondents. On the 27th of August following, this suit was instituted by the infants through their mother and guardian against B, and the auction purchasers to have the mortgage deed, the decree obtained by B, and the execution proceedings set aside, and to have the plaintiff's rights declared in the mouzah. In that suit it was found that the property had been mortgaged to pay the personal and immoral debts of A, and that B had failed to make *bonâ fide* enquiry as to the necessity of the loan. *Held*, that the respondents must be taken to have had notice, actual or constructive, of the plaintiff's petition of objections and of the order made thereon, and therefore to have purchased with knowledge of the plaintiff's claim and subject to the result of this suit; and accordingly that as against the auction-purchasers as well as against B neither the appellants nor their interests in the joint ancestral estate were liable to satisfy their father's debt. *Held*, further, that the execution proceedings under which the mouzah had been attached and ordered to be sold had gone so far as to constitute in favour of the judgment-creditor a valid charge upon the land to the extent of A's undivided share and interest therein which could not be defeated by his death; and that the effect of the execution sale was to transfer to the purchasers the undivided share in the eight annas of the mouzah which had belonged to A; and that notwithstanding his death they were entitled to work out their rights by means of a partition. GOOR PERSHAD *v.* SHEODEEN, 4 All. R., 137, overruled. RAM SAHAI *v.* SHEO PROSAD SINGH 226

——————————— *Sale in execution of a son's share—Rights of Purchaser.*] The right, title and interest in the joint estate of a son belonging to a joint family under Mitakshara law may be sold in execution of a decree against such son. DEENDYAL LAL *v.* JUGDEEP NARAIN SINGH, L. R., 4 I.A., 247, followed. ROY NARAIN DOSS *v.* NOWNIT LALL 67

Mortgage Decree—*Apportionment of Debt between separate mortgaged Properties.*] One of two mouzahs, upon a mortgage of which A had obtained a decree with an order for sale of the mortgaged properties, was attached in execution of another decree and sold subject to the first decree. A became the purchaser, and now sought to execute his decree by the sale of the second mouzah, claiming to charge his entire debt upon that village. *Held*, that he was bound to give credit for the proportionate share of the debt assignable to the first mouzah, and entitled only to execute his decree against the second village for the amount chargeable thereon. NAWAB UZIMUT ALI KHAN *v.* JOWAHIR SINGH, 13 Moore's I. A., 404, cited. GOSSYEN LUCHMEE NARAIN POORI *v.* BICRAM SINGH 294

Mortgage decree, Execution of, by holder who has also purchased part of the mortgaged property. See EXECUTION OF DECREE BY TRANSFEREE OF ORIGINAL DECREE-HOLDER 156

Mortgage—*Mortgagor, Defective title of—Equitable rights of Mortgagee.*] B having, in 1863, executed a mortgage of a 14-annas share of certain lands to A. who was the owner of a 2 annas share in the same, it turned out that B was not in a position to have mortgaged more than 12-annas. In 1865, A sold his 2-annas share to B. Subsequently B's 12-annas share, which was subject to the mortgage, was sold in execution of a decree held by A against him. A, having now sued upon the mortgage of 1863 and obtained a decree, sought to execute this decree by sale of the 2-annas share which he had since the mortgage sold to B. *Held*, that B's contract having been to hold 14-annas subject to the mortgage, A had an equitable right to demand that the 2-annas share on passing to B, should be subject to the mortgage, and that accordingly such 2-annas share was saleable in execution of A's decree. DOOLI CHAND *v.* NIRBAN SINGH 150

Mortgagor, Defective title of. See MORTGAGE 150

Mohunt, Representation of—*Certificate of administration—Act XXVII of* 1860.] The person entitled to represent a deceased Mohunt for the purpose of collecting his personal debts is the spiritual son, and not the spiritual brother of the deceased, and such spiritual son is entitled to a certificate of administration under Act XXVII of 1860. In the matter of BHYRUB BHARUTEE MOHUNT, 21 W. R., 340, distinguished. LUCHMUN BHARTEE *v.* DHUKHARAN BHARTEE 49

Multifariousness—*Joinder of Parties.*] At an auction sale for arrears of rent, on the 11th July 1865, plaintiffs purchased a tenure which, on the zemindar's *seristah*, stood in the name of one Sheikh Meajan, and proceeded to take steps to obtain possession, but were resisted by the defendants. Against one of the defendants who claimed a particular portion of the lands under the tenure in question, they brought a suit in 1869; but this suit was finally dismissed in June 1876, on the ground that all the persons, who were claimants of any part of the lands, ought to have been joined as defendants. Accordingly, a fresh suit was brought against all the claimants of the tenure. To this suit the defendants set up various and distinct defences, some alleging one defence, and some another, and so on. The Subordinate Judge dismissed the suit for multifariousness. *Held*, that there was no multifariousness, the plaintiffs' claim being to recover possession against persons who were alleged to be joint trespassers. SHEIKH OMUR ALI *v.* SHEIKH WEYLAYET ALI 455

Mutiny Act (41 Vic., Cap. 10) section 101—*Andaman and Nicobar Islands, Jurisdiction of Criminal Courts in—European British Subjects.*] Section 101 of the Mutiny Act, (41 Vic., Cap. 10) does not deprive the Criminal Courts of jurisdiction over British soldiers committing offences within the territorial limits of these Courts, nor render the exercise of their jurisdiction dependent upon the sanction of the Commander-in-Chief. EMPRESS *v.* FELIX MAQUIRE 432

Natural Guardian, Sale by. See MINOR. 247

Notice. See MITAKSHARA JOINT ESTATE 226

——— See HINDU EXECUTORS AND DEVISEES, POWERS OF 193

——— See SUIT FOR INCREASED RENT. 278

——— **Substituted Service of, when good.** See SUBSTITUTED SERVICE ... 397

Nuisance—*Criminal Procedure Code, Act X of 1872, sections 518—Power of Magistrate—Rival Hauts.*] A Magistrate has no power, under section 518 of Act X of 1872, to make an order prohibiting one of two rival proprietors, of two different hauts, from holding for the future his haut on Tuesdays and Fridays, such an order being in the nature of a perpetual injunction and entirely beyond his jurisdiction. Where the plaintiff, after stating in his plaint that for many years he had held a haut on his own lands on Tuesdays and Fridays, alleged that the defendant had set up a rival haut on the same days and endeavoured to prevent people attending his haut, thereby creating a disturbance which led to the Magistrate passing an order under section 518 of Act X of 1872, prohibiting him (the plaintiff) for the future holding his haut on these days: *Held*, that assuming the facts to

Nuisance—*continued.*

be true, the plaintiff was entitled to a decree declaring that as against the defendant he had a right to hold his haut on Tuesdays and Fridays. GOPI MOHUN MULLICK *v.* TARAMONI CHOWDHRANI 309

Onus of Proof.] In a suit for possession of land the defendants claimed to hold under a valid miras tenure so as to be entitled to the ground rent from the ryots, and to pay the plaintiff, who was the superior landlord, merely the miras rent. *Held*, that the plaintiff being admitted to be landlord, the *onus* was upon the defendants to prove either that they had a valid miras tenure, or that they had held adversely to the plaintiffs as mirasdars for more than 12 years, and that the plaintiffs had notice of such adverse holding. RAJAH SAHIB PRAHLAD SEN *v.* BUDHU SING, 2 B. L. R., P. C., 111, cited and followed. OGRAKANT CHOWDHREE *v.* MOHESH CHUNDER SICKDAR 40

——— See DILUVION 390

——— See GORABUNDI TENURE ... 298

——— See JOINT HINDU FAMILY (MITAKSHARA) 428

Occupancy, Right of—*Transfer—Abandonment of Right of Occupancy.*] The right of two three joint tenants of a ryoti tenure, held under the plaintiffs, was sold in execution of a decree of a Civil Court, and purchased by A, who continued the former holders in immediate occupancy of the lands. The plaintiffs sued for possession. No special custom allowing the transfer in the district of such tenures having been proved, *Held*, that there was no transfer by the sale to A, of the occupancy rights of the ryots; that the ryots had, by agreeing to hold under A, abandoned their rights of occupancy as much as if they had gone away from the lands; and that therefore plaintiffs were entitled to khas possession. Cf.—NARENDRO NARAYAN ROY CHOWDHRY *v.* ISAN CHUNDRA SEN, 13 B. L. R., F. B., 274. DWARKA NATH MISSER *v.* HURISH CHUNDER ROY CHOWDHRY ... 130

Parol Evidence, Admission of—*Kabuliat—Evidence Act, I of 1872, section 92, provisos 2 and 3.*] Plaintiff having sued for arrears of rent payable under a kabuliat in respect of a share of four villages, the defendant pleaded that he had been put in possession of one only of the four leased to him, and that therefore he was not liable to the whole claim. Parol evidence was admitted to show that at the time the kabuliat was granted it had been agreed between the plaintiff and defendant, the title of the former being under dispute, that the whole rent payable under the kabuliat should be payable in respect of such of the villages as should actually come into defendant's possession. *Held*, that such parol evidence was rightly admitted, there being

Parol Evidence—*continued*
no stipulation in the lease that the defendant should only pay rent on being put completely into possession, and that although payment of rent is not ordinarily enforced unless the lessor puts the lessee into possession, it was quite competent to the parties to waive such privilege. RAM KISHORE LALL *v.* NUND RAM 100

Partial Partition. See JOINT HINDU FAMILY (MITAKSHARA) 428

Partition of lands excluded by Collector in former Partition, Suit for. See JURISDICTION 35

Partition Suit by brother. See PARTIES 161

Parties—*Partition Suit by brother—Joinder of Widows.*] In a suit brought by the only son of one of the two widows of a deceased intestate for partition of the property left by him, against the sons of the other widow, the two widows not having been made parties, it was *held*, that the suit, as framed, could not proceed. TORITA-BHOOSUN BANERJEE *v.* TARAPROSUNO BANERJEE 161

2. ——— *Suit to eject tenant of a joint fishery.*] A suit will not lie to eject a tenant of a joint fishery, unless all the joint proprietors are joined as parties. DOLI SATI *v.* SYED IKRAM ALI... 63

Party to Suit. See PRACTICE 32

Pauper Suit See PROCEDURE 331

Payment, Plea of. See EVIDENCE ACT, I OF 1872, SECTION 92 274

——— ——— See SET-OFF... ... 296

Penal Code, sections 211, 182 and 500. See CRIMINAL PROCEDURE CODE (ACT X OF 1872) SECTIONS 147 AND 467 413

Plaint, Proof of title alleged in. See *Res Judicata* 443

Pleadings, Adding issues not strictly arising upon. See ISSUES, AMENDMENT OF 353

Practice—*Distraint—Party to Suit.*] A landlord who supplies seed to his tenants upon condition that they shall cut and store the crops grown therefrom in his *chuck*, and after threshing the same, shall make over to him one-half of the produce, has such an interest in, and dominion over, the crops, as to entitle him to bring a suit against a person who has wrongfully distrained such crops. HURRO NARAIN CHOWDHRY *v.* SADHA KRISTO BURA 32

2. ——— *Evidence—Interrogatories.*] A party wishing to use answers to interrogatories administrated by him in a suit must put them in as part of his evidence. GOSTO BEHARY PAL *v.* JOHUR LALL PAL 164

——— See DAMAGES, MEASURE OF ... 473

Possession, Suit for—*Priority of Mortgages of same property—Possession, Right to present—*

Possession, Suit for—*continued.*
Effect of prior sale in execution where there are two decrees on mortgages of same property.] Where a suit for possession of certain property was brought against the defendants who had been let into possession of certain lands as purchasers of the right, title and interest of the mortgagor, at a sale in execution of decree, upon a mortgage of that property, by the plaintiffs who had also obtained a decree but subsequently to that of defendants, upon a mortgage of the same property, executed on the same day as the defendants' mortgage, and at a sale in execution of such decree, had purchased the right and interest of the mortgagor, it was *held*, that the defendants, under their purchase, were entitled to the present right of possession, and that the plaintiffs could not, in a suit for possession only, raise the question as to whose mortgage was prior in point of time. *Per* GARTH, *C.J.*—The right to the possession of the property cannot depend upon which of the mortgages was first. NANAK CHAND *v.* GOSSAIN LUCHMEE NARAIN PUREE 358

Power of Magistrate. See NUISANCE 309

Prejudging defence to charge committed to Sessions Court. See COMMITTAL TO SESSIONS COURT 338

Present Possession, Right to. See POSSESSION, SUIT FOR 358

Presidency Magistrates' Act, IV of 1877, section 87, Explanation 2—"*Revival of a prosecution.*"] The revival of a prosecution, as mentioned in explanation 2 to section 87 of Act IV of 1877 (The Presidency Magistrates' Act), is not a continuation of the original prosecution, and upon such revival all the witnesses on whose evidence the prosecution intends to rely, as justifying the committal of the accused, must be examined before the Magistrate, and such of them as have been examined at the time of the original prosecution must be examined *de novo*. EMPRESS *v.* CHUNDER NATH DUTT 305

Priority of mortgages of same Property. See POSSESSION, SUIT FOR 358

Priority. See REGISTRATION. 257

Probate—*Document partly testamentary, Construction of—Gift, Deed of—Act X of 1865, section 3.*] If one part of a document is testamentary in its character, it may be presumed that the remainder, if the language is capable of that construction, is also intended to be testamentary. Under such circumstances, where there is nothing inconsistent with the supposition that the arrangements made therein are to take effect from the death of the person executing it, the document ought to be admitted to probate as a will. KOMOLA KANT BISWAS, *In the matter of* 401

Privy Council—*Mitakshara Joint Estate—Sale of deceased father's Share—Rights of Purchase—Notice.*] A, a Hindu governed by the

Privy Council—*continued.*
Mitakshara Law, having two sons born in 1862 and 1869, respectively, in consideration of a loan, mortgaged joint ancestral property, consisting of an eight-anna share of a certain mouzah to B, by a deed of mortgage, dated 21st January 1870. In 1872 B obtained a decree upon the mortgage for principal, interest, and costs, and in execution of this decree proceedings were instituted and the eight-anna share in the mouzah attached. After several adjournments the sale of the attached property was fixed for the 23rd May 1873, but on the19th of the same month A died. The proceedings were thereupon revived against A's heirs, his infant sons, and the sale was finally fixed for the 28th July 1873. Meanwhile, on the 14th July, the mother and guardian of the infants filed a petition objecting to the sale and praying for the protection of the interests of her son's as co-sharers with their late father in the property. The petition was dismissed, and an order passed thereon directing that the proper remedy was by regular suit. The sale was accordingly held, and an eight-anna share of the judgment-debtor in the mouzah was sold and purchased by the respondents. On the 27th of August following, this suit was instituted by the infants through their mother and guardian against B and the auction-purchasers to have the mortgage deed, the decree obtained by B, and the execution proceedings set aside, and to have the plaintiff's rights declared in the mouzah. In that suit it was found that the property had been mortgaged to pay the personal and immoral debts of A, and that B had failed to make *bonâ fide* enquiry as to the necessity of the loan. *Held*, that respondents must be taken to have had notice, actual or constructive, of the plaintiff's petition of objections and of the order made thereon, and therefore to have purchased with knowledge of the plaintiff's claim and subject to the result of this suit; and accordingly that as against the auction-purchasers as well as against B neither the appellants nor their interests in the joint ancestral estate were liable to satisfy their father's debt. *Held*, further, that the execution proceedings under which the mouzah had been attached and ordered to be sold had gone so far as to constitute in favour of the judgment-creditor a valid charge upon the land to the extent of A's undivided share and interest therein which could not be defeated by his death; and that the effect of the execution sale was to transfer to the purchasers the undivided share in the eight annas of the mouzah which had belonged to A; and that notwithstanding his death they were entitled to work out their rights by means of a partition. GOOR PERSHAD *v.* SHEODEEN, 4 All. R, 137, over-ruled 227

2.————*Procedure—Pauper Suit—Court Fees, Effect of payment of, pending Enquiry into Pauperism—Limitation.*] Where, after a petition for leave to sue in *formâ pauperis* has been filed and pending proceedings taken to enquire into the pauperism, the petitioner pays the necessary amount of stamp fees into Court, the petition shall be treated for the purposes of limitation as a plaint from the day on which it was filed and not from the payment of the fees. SKINNER *v.* ORDE 331

Probate of Will, Revocation of—*Procedure—Revocation of Probate, Right of Assignee of Heir to apply for.*] Plaintiff who, in June 1875, purchased the interest of the widow and sole heiress of one J. D., who died in 1872, brought a suit for possession of the same, alleging that J. D. had died intestate, and that a will of which the defendant, the brother of deceased, had obtained probate on the 13th November 1875, and on which he relied, was a forgery. The Subordinate Judge, being of opinion that probate was conclusive of the genuineness of the will, dismissed the suit. But on appeal the District Judge remanded the case, directing the lower Court to try the issue as to the genuineness of the will. Upon trial the will was found to be a forgery, and upon this finding the District Judge decreed the plaintiff's suit. *Held*, that the Subordinate Judge had no power to determine the issue, whether the will was genuine or not, and that the proper course for the party seeking to impugn the will was to apply to the District Judge to revoke the probate under the provisions of the Indian Succession Act.

Procedure to be followed in suits for revocation of probate discussed. *Semble.*—That the assignee of the heir can apply to revoke the probate. BYJNATH SHAHAI *v.* DESPUTTY SINGH, 25 W. R., 489, cited and distinguished; MAYHO *v.* WILLIAMS, 2 N.-W.-P. H. C. R., 268, followed. KOMUL LOCHUN DUTT *v.* NILRUTTON MONDUL... 175

Probate. See ACT X OF 1865, SECTIONS 244 AND 256 498

Proceeding based upon insufficient Materials. See CRIMINAL PROCEDURE CODE (ACT X OF 1872) SECTION 530 ... 483

Procedure. See ASSESSORS 405

————*Execution of Decree of Privy Council—Act X of 1877, section 610—Decree, Copy of.*] On the application by the decree-holders for execution of a decree of the Privy Council, a copy of the decision, but not of the decree of the Judicial Committee, was filed. *Held*, that under section 610 of the Civil Procedure Code, (Act X of 1877), the applicants were bound to produce a copy of the formal decree before an order could be granted for execution to proceed. JUGGERNATH SHAHOO *v.* JUDOO ROY SINGH 387

————See PROBATE OF WILL, REVOCATION OF... 175

Procedure—*Pauper Suit—Court Fees, Effect of payment of, pending Enquiry into Pauperism—Limitation.*] Where, after a petition for leave to sue in *forma pauperis* has been filed and pending proceedings taken to enquire into the pauperism, the petitioner pays the necessary amount of stamp fees into Court, the petition shall be treated for the purposes of limitation as a plaint from the day on which it was filed and not from the payment of the fees. SKINNER v. ORDE 331

———See EXECUTION OF DECREE ... 11

Proclamation, Waiver of. See APPEAL 23

Promissory Note payable on demand. See LIMITATION 102

Prosecution under section 211 of Penal Code (Act XLV of 1860). See DISMISSAL OF COMPLAINT 134

Purchaser from Hindu Executor, Position of. See HINDU EXECUTORS AND DEVISEES, POWERS OF 193

"Puttro Poutradi." See WILL, CONSTRUCTION OF 77

Question relating to Execution of Decree. See APPEAL 27

Recognizance, Forfeiture of—*Criminal Procedure Code, Act X of 1872, section 502.*] According to the fair construction of section 502 of the Code of Criminal Procedure a Magistrate is not justified in forfeiting a recognizance to keep the peace under that section, unless the party charged with a breach of the peace has had an opportunity of cross-examining the witnesses upon whose evidence the rule to show cause has been issued. EMPRESS *v.* NOBIN CHUNDER DUTT 293

Records sent for, Discretion of Court as to sending. See ACT VIII OF 1859, SECTION 138 36

Re-formation of lands on old site. See DILUVION... 390

Refund of Purchase Money. See CONSIDERATION, FAILURE OF 20

Registration—*Priority—Bill of Sale—Act VIII of 1871, sections 48 and 50—Act III of 1877, sections 48 and 50.*] Plaintiff, having purchased the jote right of the defendant's landlord by a deed of sale, dated Cheit 1282, and, although the property was below the value of Rs. 100, registered, sued the defendant for possession and for the recovery of the rent of the jote. The defendant, who was actually in possession, alleged that he himself had purchased, also for less than Rs. 100, the same jote right from his landlord by a deed of sale, dated Pous 1282 (or two months prior to the date of the other), but unregistered. It having

Registration—*continued.*

been found that the defendant, previous to his alleged purchase, had held the jote lands as tenant of their common vendor under a kabuliat, and that this kabuliat had been allowed to remain in the hands of the landlord, it was *held* that, under the circumstances, the plaintiff's deed being registered, though registration was optional, was entitled to priority. Section 50 of Act VIII of 1871 (corresponding with section 50 of Act III of 1877) is intended to apply to the case of two innocent purchasers giving the preference to him who has taken the greater precaution to secure his title, but not to the case of a subsequent purchaser who registers, but who at the date of his purchase had actual notice of a prior unregistered deed of sale. Notice of a prior unregistered alienation must be very clearly proved against a subsequent registered purchaser in order to prevent his registered conveyance taking effect. Section 48 of Act VIII of 1871 (corresponding with section 48 of Act III of 1877) is applicable to all oral transactions, whether voluntary or for valuable consideration, and whether the property is moveable or immoveable, and whether its value is over or under Rs. 100. *Per* PONTIFEX, *J.*—The insertion of the words relating to possession in section 48 appears to have been merely intended as a declaration of the law, limiting the operation of oral alienations. It was in effect equivalent to saying that, although the Registration Acts are not intended to interfere with oral alienations which, from the nature of the case, cannot be registered, yet the only oral alienations of which the law can take notice in competition with registered instruments are those which are properly established by evidence of possession. FAKIR MAHOMED KHAN *v.* FAZELUDDEEN KHAN 257

Regulation VIII of 1819, Effect of Sale under, being set aside—*Right of former holders of under-tenures to possession, after irregular sale avoiding their tenures has been set aside.*] Plaintiff, whose *chahar* putni had been avoided along with the intermediate tenures by the sale of the putni under Regulation VIII of 1819, in order not to lose possession of the land, took an entirely new durputni from the purchaser at such sale of the putni. Thereupon the L. M. Bank, in execution of a mortgage decree which it held against him, sold this durputni, and the defendant became the purchaser. Subsequently the sale of the putni having been set aside, the putni, the intermediate tenures, and the plaintiff's *chahar* putni came again into force, and the plaintiff brought a suit against the defendant to recover possession as *chahar* putnidar. The defendant contended that, before plaintiff could recover possession, he must refund the amount paid by way of purchase-money by defendant at the execution sale of the durputni which had gone in part satisfaction of plaintiff's mortgage

Regulation VIII of 1819—*continued.*
debt. *Held*, that plaintiff was absolutely entitled to possession, the payment by the defendant being a mere voluntary payment which plaintiff was in no way bound to recognize. RAM TUHUL SINGH *v.* BISESWAR LALL SAHOO, L. R., 2 Ind. Ap., 143, quoted. SRINARAIN BAGCHI *v.* PATRICK SMITH 148

——————————**section 11**—*Sale for Arrears—Cancelling of under-tenures—Act VIII (B.C.) of* 1865, *section* 16—*Act VIII (B.C.) of* 1869, *section* 27.] Lands appertaining to a certain talook which was sold under Regulation VIII of 1819 for arrears, were held from the owner of the talook under a *kaimi jumma* tenure, under which the plaintiff, who sued the purchaser for confirmation of his title, cultivated the land through persons called *burgaits* with whom he shared the profits in some way. *Held*, that under section 11 of that Regulation the plaintiff's tenure was cancelled. Compare UNNODA CHURN DAS *v.* MUTTHURANATH DAS BISWAS, 4 C. L. R., 6; RANEE SURNOMOYEE *v.* MAHARAJAH SUTTEES CHUNDER, ROY BAHADOOR, 10 Moore's I. A., 123, cited and discussed. MOHINI CHUNDER MOZUMDAR *v.* JOTIRMOY GHOSE 422

Relationship, Evidence of Family Priest as to. See EVIDENCE ACT, I OF 1872, SECTION 32, CLAUSE 5 173

Remand, Appeal from order of. See ACT X 1877, SECTION 588 (W.) 465

Rent, Arrears of. See INTEREST ... 349

Resident and Hereditary Cultivator. See UNDER-TENURE, SUIT TO AVOID ... 165

Res judicata—*Act VIII (B.C.)* 1869, *section* 27—*Plaint, Proof of title alleged in—Variance.*] A suit brought by the plaintiff in December 1875 on an alleged mocurrari pottah to recover possession, with mesne profits, of certain jamai lands of which he had been dispossessed in Pous 1278, having been dismissed, as barred by section 27 of Act VIII (B.C.) of 1869, the plaintiff, in September 1877, instituted a fresh suit on same cause of action for possession, with mesne profits, of the same lands, it was found by the lower Courts that the alleged pottah was invalid; but that apart therefrom the plaintiff had acquired a right of occupancy, and was entitled to possession. *Held*, that inasmuch in the first suit the plaintiff's cause of action was not heard and determined the present suit was not *res adjudicata*. *Held*, further, that having failed to prove his title under the pottah, the plaintiff was not entitled to a decree on the strength of a right of occupancy which he had established, but which he had not claimed in his plaint. BIJOYA DEBIA *v.* BYDONATH DEB, 24 W. R., 444, cited and followed. BRINDABUN CHUNDER SIRCAR CHOWDHRY *v.* DHAUNAJOY LUSKAR 443

Res judicata—*continued.*
2.——————*Act X of* 1877, *section* 13, *Expl. II.—Ejectment.*] In a suit for rent and for ejectment, the defendant pleaded that his tenure was transferable and *istemrari*, and consequently protected by the Rent Law. In a former suit for arrears of previous years, in which the defendant pleaded that his tenure was *istemrari*, the plaintiff obtained a decree for ejectment on non-payment of rent within 15 days. In that case the defendant saved his tenure by payment within the time stated. *Held*, that inasmuch as the defendant might in the former suit, in which the nature of the tenure was put in issue, have urged that his tenure was both transferable and *istemrari*, he could not in the present suit be allowed to alter his defence and rely upon the tenure being transferable. WOOMATARA DEBIA *v.* UNNOPOORNA DASSEE, 11 B. L. R., P. C., 158, cited and followed. (Compare now Act X of 1877, section 13, Expl. II.) DINOMOYI DABIA CHOWDHAIN *v.* ANUNGO MOYI 599

3.——————*Jurisdiction.*] A sued B for arrears of rent. B admitted the amount claimed, but contended that it was payable for a larger area than that specified by the plaint. An issue was framed upon the question whether the amount was due upon the larger or smaller area, and decided against the latter. B afterwards brought a suit for a declaration that the money admitted to be due had been paid in respect of the larger area. *Held*, that the suit was barred by the decree in the previous suit. BUSSUN LAL SUKUL *v.* CHUNDI DOSS.

4.——————*Suit for Arrears of Rent against purchaser from defendant in former suit.*] Pending the delivery of judgment in a suit, against the registered putnidars, for arrears of rent, the defendants transferred their interest in the putni to A. An application was made to have A made a party; but this was refused, and a decree given for the plaintiff. Subsequently a fresh suit was brought against A for the same arrears. *Held*, that inasmuch a suit for arrears of rent may be brought either against the registered putnidars, or the purchaser from them, the subsequent suit must be treated as a suit against a defendant, severally liable, with the defendants in the original suit, for the same debt, and, accordingly, that it was not barred, provided the decree in the other suit were not fully satisfied. ROY DHUNPUT SINGH BAHADOOR *v.* SHAM SOONDER MITTER 501

"Revival of Prosecution." See PRESIDENCY MAGISTRATES' ACT, IV OF 1877, SECTION 87, EXPL. 2 305

Review. See SALE FOR ARREARS OF RENT 371

Revivor. See ABATEMENT OF SUIT ON DEATH OF SOLE PLAINTIFF 374

Revocation of Probate. Right of Assignee of Heir to apply for. See PROBATE OF WILL, REVOCATION OF 175

Right and Interest. See ACT X OF 1877, SECTION 588 (w) 465

Right of Complainant to be examined. See DISMISSAL OF COMPLAINT ... 134

Right of former-holders of under-tenures to Possession, after irregular sale avoiding their tenures has been set aside. See REGULATION VIII OF 1819, EFFECT OF SALE UNDER, BEING SET ASIDE 148

Rights of Purchaser. See MITAKSHARA JOINT ESTATE 67

——————— See MITAKSHARA JOINT ESTATE 226

Rival Hauts. See NUISANCE 309

Sale, Effect of, prior, in execution where there are two decrees on Mortgages of same property. See POSSESSION, SUIT FOR 358

Sale for Arrears. See REGULATION VIII OF 1819, SECTION 11 422

——————— See ACT VIII (B.C.) OF 1865 6

Suit for Arrears of Rent, by person claiming to be landlord. See INTERVENOR 168

Sale in Execution of a Son's Share. See MITAKSHARA JOINT ESTATE 67

Sale of Deceased Father's Share. See MITAKSHARA JOINT ESTATE 226

Sanction to Prosecute. See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTIONS 147 AND 467... 413

Sapindas. See HINDU LAW 538

Secondary Evidence to prove unattested Confessions. See CODE OF CRIMINAL PROCEDURE, ACT X OF 1872, SECTIONS 122 AND 346 137

Service Tenure. See JAGHIR TENURE, NATURE OF 583

Set off. See SOLICITOR'S LIEN 122

———*Plea of Payment.*] In a suit by a zemindar for arrears of rent, the defendant alleged that his tenure had been placed under the management of the Collector, and had so remained for a number of years, and that the Collector, from money realized by him as manager, had, in addition to satisfying all other claims of the plaintiff, paid the rents accruing, not only during the period of his management, but up to, and inclusive of, the years, the arrears of rent for which were claimed in the suit. The lower Court refused to consider the defendant's plea, on the ground that it was in the nature of a set-off, and that not being a debt due from the plaintiff to the defendant, it was not such a set-off as could be allowed by the Court. *Held*, that the plaintiff's plea was a plea of payment merely and not in the nature of a set-off. KOONJO BEHARY

Set off—*continued.*

SINGH *v.* RAJA NILMONEY SINGH DEO BAHADOOR 296

"Shesh Projunto." See LIMITATION ... 34

Small Cause Court Act (IX of 1850), section 58—*"Goods and Chattels"—Fixtures—Trade fixtures—Execution of Small Cause Court Decree.*] In execution of a decree of a Presidency Court of Small Causes, certain flour and oil mills, with a steam engine, boiler, and other machinery were seized and sold. In a suit against the purchaser for damages for the removal of the same, it was *held*, that although the property seized and sold might, according to English law, be considered to be trade fixtures, and so seizable in execution for a tenant's debts, yet it did not come within the description "goods and chattels," used in section 58 of Act IX of 1850, and could not, therefore, be taken in execution of a Small Cause Court decree. A. B. MILLER *v.* BRINDABUN ... 460

Small Cause Courts—*Jurisdiction.*] A suit to obtain an order from the Court that a decree upon a mortgage of a certain house should be enforced against the person and property of the defendant, who had purchased the house at auction subject to the plaintiff's mortgage, but had subsequently removed the materials of the same and so deprived the plaintiff of his lien thereon, not being a claim for debt, damages, or for the recovery of property, is not cognizable by a Court of Small Causes. MOULVIE OMER KUHIM *v.* LALA SHEWAN LALL 291

Small Cause Court, Suit on Decree of. See SUIT ON SMALL CAUSE COURT DECREE 477

Solicitor's Lien—*Set off—Act X of 1877, sections* 111 *and* 221] In a redemption suit in which it was directed that the plaintiff (the mortgagor) should pay to the defendant (the mortgagee) the amount of the mortgage money, and that the defendant should pay to the plaintiff the cost of the suit, it was *held* that the plaintiff was entitled to set off the amount payable to him against the amount which he was ordered to pay to the defendant notwithstanding any claim the solicitors of the latter might have against him in respect of his costs of the suit. Act X of 1877, sections 111 and 221, discussed. BRIJO NATH DASS *v.* JUGGERNATH DASS... 122

Special Appeal—*Jurisdiction—Valuation of Suit—Appeal to wrong Court.*] Where an appeal is preferred to a District Court against a judgment in a suit for possession of property valued at over Rs. 5,000, the High Court will, on Special Appeal, set aside the judgment of the lower Appellate Court as made without jurisdiction, although both sides may have acquiesced in the appeal being heard in the District Court. AUKHIL CHUNDER SEN RAY *v.* BABOO MOHENDRA MOHUN DAS 491

Specific Relief Act, I of 1877, section 42 20

Stay of Execution of High Court Decree pending Appeal to Privy Council. See APPEAL TO PRIVY COUNCIL 125

Stay of Proceedings in one of two Suits in respect of same Subject matter in different Courts—*Act X of* 1877, *section* 20.] A, who was employed by B. & Co., as their agent at Calicut, instituted a suit for the balance of an account against his principals in the Court of the Subordinate Judge there in July 1878. In December of the same year, B. & Co. instituted the present suit against A, for an account, and for damages caused by his alleged negligence. *Held* that, as in both suits practically the same issues were triable, A was entitled, as having been first to institute his suit, to proceed in the Court in which he had chosen to bring his suit, and to have the other suit stayed, but without prejudice to the right of the plaintiffs in the latter suit to institute a cross-claim in the Calicut Court. MECKJEE KHETSEE *v.* KASOWJEE DEVACHUND [282

Substituted Service—*Notice, Substituted service of, when good.*] Service of notice upon a defendant, by affixing the same upon the door of his dwelling house, is not sufficient, unless the condition exists which alone renders substituted service good, namely, that the person upon whom it is sought to effect service is keeping out of the way. RAM CHUNDER DUTT *v.* JOGESH CHUNDER DUTT, 19 W. R., P. C., 356, cited and followed. RAMA RAI *v.* SRIDHUR PERSHAD NARAIN SAHAI 397

Suit for arrears of rent against purchaser from defendant in former suit. See *Res Judicata* 501

Suit for arrears of rent—*Review—Limitation—Act VIII(B.C.) of* 1869, *section* 103—*Act XV of* 1877, *section* 12.] While according to section 6 of the Limitation Act, XV of 1877, the period of limitation prescribed by section 103 of Act VIII (B.C.) of 1869, for the application for a review of any judgment or order under the provisions of that Act, remains unaltered, the rules prescribed by the Limitation Act for computing the period of limitation are applicable to rent suits. Accordingly a party applying for a review of judgment on appeal in a rent suit would be entitled to the benefit of the rule in section 12 of the Limitation Act, by which the time requisite for obtaining a copy of the judgment shall be excluded in computing the period of limitation. BEHARI LALL MOOKERJEA *v.* MUNGOLA NATH MOOKERJEA 371

Suit for Increased rent—*Express Agreement—Notice—Act VIII (B.C.) of* 1869, *section* 14.] Where lands are held under a pottah by the express terms of which rent is payable at certain rates upon the quantity of land that may be found on measurement, if on measurement being made, it is ascertained that a larger area exists than that in respect of which rent has hitherto

Suit for Increased rent—*continued.*
been paid under the pottah, the landlord is entitled to claim an increased rent in proportion to the larger area, without serving the tenant with notice under section 14 of Act VIII (B.C.) of 1869. NISTARINI DASI AND BONOMALI CHATERJEE AND ANOTHER *v.* DINONATH BOSE AND ANOTHER AND BONOMALI CHATTERJEE AND ANOTHER 278

Suit for Partition. See JOINT HINDU FAMILY (MITAKSHARA) 428

——— of Lands, excluded by Collector in former Partition. See JURISDICTION 33

Suit on Small Cause Court Decree—*Small Cause Court, Suit on Decree of.*] A suit will not lie in the High Court on a decree of the Small Cause Court—KHOBLALL BABOO *v.* RAM CHUNDER BOSE, I. L. R., 2 Cal., 434, over-ruled. BEEKNLEY *v.* ELDERKIN, 1 E. and B., 805; AUSTIN *v.* MILLS, 9 Exch., 288, followed. MOONSHEE GOLAM ARUB *v.* CUREEM BUX SHAIKJEE 477

Suit to eject tenant of Joint Fishery. See PARTIES 63

——— to set aside a decree of High Court—*Leave to sue whether necessary—Letters Patent, cl.* 12—*Description of place of abode of plaintiff and defendant—Verification of plaint—Act X of* 1877, *sections* 50, 51, 52.] It is not necessary to obtain the leave of the High Court under cl. 12 of the Letters Patent, to sue to set aside a decree of that Court made upon a compromise to which the plaintiff has been induced by the misrepresentations of the defendant to agree, even when it appears from the plaint that the defendants are outside the jurisdiction of the Court. To describe the plaintiff as residing in Chitpore Road in the Town of Calcutta is not a sufficient description, under section 50 of the Civil Procedure Code, of his place of abode; nor is it sufficient under that section to describe the defendant as formerly of Calcutta without alleging that the plaintiff has been unable to ascertain his place of residence more definitely. Where the plaint alleges matter which cannot be personally known to the person making the verification, and which is not stated to be an information and belief, a verification which does not distinguish how much is true to the knowledge of the person making it, and what is alleged to be true on information and belief, does not fulfil the requirements of section 52. Bibee SOLOMAN *v.* ABDOOL AZIZ 366

——— to set aside order. See INJUNCTION TO RESTRAIN DECREE-HOLDER FROM EXECUTING DECREE 494

Surety. See HUNDI, LIABILITY OF ACCOMMODATION, ACCEPTOR OF 145

——— on bond undertaking to pay 'Eventually.' See LIMITATION ... 34

Taluq apportioned by Butwara. See ENHANCEMENT OF RENT 448

Trade Fixtures. See SMALL CAUSE COURT ACT, IX OF 1850, SECTION 58 460

Transfer. See OCCUPANCY, RIGHT OF ... 130

Transfer of Gorabundi Tenure. See GORABUNDI TENURE, NATURE OF 298

Trial by Jury of Offences, some of which are triable with the aid of Assessors. See ASSESSORS 405

Under closed principal. See CHARTER-PARTY, CONSTRUCTION OF 377

Under-tenure, Suit to avoid—*Act XI of 1859, section 37—Act VIII (B.C.) of 1865, section 16—Resident and Hereditary Cultivator.*] A certain chur having been converted into two estates paying Government revenue, the plaintiffs became the purchasers of one of these estates at a sale for arrears of revenue and of a howla lease of the other at an auction sale for arrears of rent, and brought a suit in virtue of section 37 of Act XI of 1859, and section 16 of Act VIII (B.C.) of 1865, to avoid the tenures of the defendants who held in shikmee talookdaree and howladaree tenure, lands appertaining to both estates. The defendants admitted the alleged nature of their holdings, but claimed exemption from eviction, on the ground that their ancestor, more than 12 years before, had cleared and cultivated the land and built a house thereon, and that since his death they themselves had continued to cultivate the land and reside upon it. The lower Courts having found that the defendants were hereditary and resident cultivators, it was *held* that the defendants were entitled to the benefit of the proviso in section 16 of Act VIII (B.C.) of 1865, the words of that proviso being wide enough to embrace every resident and hereditary cultivator irrespective of his denomination. SHEIKH MAHOMED ASANOOLLAH CHOWDHRY *v.* SHAMSHIR ALI . 165

Valuation of Partition Suit—*Jurisdiction—Market-value of subject-matter*]. In a partition suit the plaintiffs, who claimed a four-anna share of 21 cottahs of land, of which the value was not more than Rs. 150 per cottah, valued their claim at Rs. 600. *Held*, that the valuation fixed by the plaintiffs was not unreasonable. *Per Curiam.*—In a suit for partition, strictly speaking, the valuation of the claim would be that at which the plaintiff would value the convenience of changing the form of his enjoyment of the share, and neither a decision as to the valuation of a previous suit for a portion of the same land, nor an enquiry as to the market-value of the land, would be particularly relevant. RAGENDRO LALL GOSSAMI *v.* SHAMA CHURN LAHOORY 417

Valuation of Suit. See SPECIAL APPEAL 491

Value of Subject-matter. See APPEAL TO PRIVY COUNCIL... 125

Variance. See JURISDICTION 52

——See RES-JUDICATA 443

Verification of Plaint. See SUIT TO SET ASIDE A DECREE OF HIGH COURT ... 366

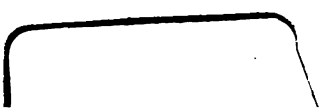
Will, Construction of—*Absolute Estate—Words of Limitation—Puttro Putradi.*] The testator, a Hindu, died in 1874, leaving him surviving a widow, and H D a daughter's daughter, and a brother R L. By his will, after providing that in the event of his leaving no son, son's son or son's grandson, his widow should take the estate and enjoy the profits thereof for life, and that on her death, in the event of daughters being born to himself, they, or on their death, their sons, should take, the testator directed (passing over his next heir R. L.) that on failure of the heirs already mentioned his daughter's daughter H D "shall be owner of my property, and without dispute shall possess the same to her sons and son's sons, in succession ('*puttro poutradi*')," except that, if she should "be barren (*avira*) or a childless widow or otherwise disqualified, she shall not become entitled to my property, but shall receive an allowance of Rs 300 per mensem for life;" and further that in the event of failure of heirs as above, and of the disqualification of H D, the whole of the property should vest in the Government for certain charitable purposes. *Held*, that the testator's intention was to confer, in the certain events mentioned, on H D if she lived, and was qualified at the death of the widow, not a life interest, but an absolute estate, to the exclusion of R L; and that, as the conditions imposed were neither repugnant to Hindu Law nor inconsistent with the nature of the gift, that object had been effectuated. *Held*, also, that the gift of the reversion to the Government in case of H D not surviving or of being disqualified was good and valid. In the absence of anything showing an intention to limit their signification, the words "*puttro poutradi*," being first in the category of heirs, may be taken to refer to heirs generally, and not to be limited to heirs male. SREEMUTTY HORI DASSI *v.* THE SECRETARY OF STATE FOR INDIA 77

Words "Goods and Chattels." See SMALL CAUSE COURT ACT, IX OF 1850, SECTION 58 [460

——**"Incapable of giving Evidence."** See EVIDENCE ACT, I OF 1872, SECTION 33 504

——**of Limitation.** See WILL, CONSTRUCTION OF 77

——**"Puttro Poutradi."** See WILL, CONSTRUCTION OF 77

——**"Revival of Prosecution."** See PRESIDENCY MAGISTRATES' ACT, IV OF 1877, SECTION 87, EXPL 2 365

——**"Shesh Projunto."** See LIMITATION 36